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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BESSER,
PETITIONER

vs

ROBERT GRAHAM, GOVERNOR,
RESPONDENT

CASE NO. 79-5710

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, BESSER v. GRAHAM, 57021 (Nov. 1, 197

AFFIDAVIT AND MOTION TO PROCEED
PURSUANT TO TITLE 28, 1915 U.S.C.A.

Comes now William P. Besser, Petitioner and states to the Court that the statements contained in his Petition are true to the best of his knowledge and belief; that he believes he has a just and meritorious cause; that this action is taken in good faith; that he believes he is entitled to relief; that he is without funds to pay or secure costs;

WHEREFORE;

He moves the Court grant an order permitting him to file and proceed without payment of costs or security therefor.

Respectfully submitted,

William P. Besser
WILLIAM P. BESSER, pro se
BOX 1100-651
AVON PARK, FLORIDA 33825

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27th DAY OF NOVEMBER, 1979.

John B. Rittenhouse
NOTARY PUBLIC
Notary Public, State of Florida at Large
My Commission Expires Feb. 19, 1984

CERTIFICATE OF SERVICE

I, William P. Besser, do hereby certify that a true and correct copy of the foregoing Affidavit and Motion to Proceed has been furnished to Jim Smith, Attorney General of Florida, The Capitol-Suite 1501, Tallahassee, Florida 32304 this 27th day of November, 1979, via United States Mail.

William P. Besser
WILLIAM P. BESSER

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-VS-

ROBERT GRAHAM, GOVERNOR;
RESPONDENT

CASE NO. 79-5710

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA, IN CASE #57,021

* * * * * * * * * * * * * * * * * *

OPINIONS

The Supreme Court of Florida denied relief, per curium, the 1st day of November 1979, citing Harris v Wainwright, #56,716 (Nov. 1st, 1979). (Copies of both decisions hereto attached.)

STATEMENT OF GROUNDS

The State Supreme Court of Florida decided in a manner conflicting with recent decisions of the State Supreme Court of Louisiana and in open conflict with prior decisions of The Supreme Court of The United States on a Constitutional Issue (Article I, Section 9 and Article I, Section 10, Constitution of The United States); - and is a matter of great public interest since it affects approximately 20,000 Florida prisoners.

The decision was handed down the 1st day of November, 1979 and this Court has jurisdiction under Title 28, Section 1651.

THE QUESTIONS PRESENTED

1. Where a statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such statute to the accused ex post facto?
2. Is it proper for a State Supreme Court to merely parphrase a Response filed by Respondent Governor as to a constitutional claim; or must such Supreme Court consider the merits and find its own conclusion?

CONSTITUTIONAL PROVISIONS

This case involves Article I, Section 9 and Article I, Section 10, Constitution of The United States and the Due Process Clause of the Fourteenth Amendment.

It presents Chapter 20, Florida Statutes 944.27, 944.271 and 944.29 all repealed; as opposed to Florida Statute 944.275.

STATEMENT OF THE CASE

Petitioner was arrested and charged with Attempted Burglary and Possession of Burglary Tools the 3rd day of November, 1976.

He was tried to a jury in Circuit Court of Pinellas County the 13th day of January, 1977, convicted, and sentenced to 7 years imprisonment.

On the 8th day of March, 1977 he was entered into Lake Butler Reception Center at Lake Butler, Florida and issued a rule book showing a gain time chart. His date of expiration was fixed at May 20, 1981, minus any "additional earned gain time".

By November, 1978 he had been awarded "additional earned gain time" in the amount of 97 days.

In May, 1979 he was awarded "additional earned gain time" in the amount of 43 days.

In November, 1979 he was awarded "additional earned gain time" in the amount of 94 days.

He was notified by the Department of Corrections that his date of expiration had been changed from February 7, 1981 (minus 147 days additional gain time) to the 28th day of October, 1982; due to enactment of a new statute (944.275).

In May, 1979 he filed a Petition For Injunction to The Supreme Court of Florida citing ex post facto application of the new law, Florida Statute 944.275.

On November 1st, 1979 the Florida Supreme Court denied, citing Harris v Wainwright, #56,716 (Nov. 1st, 1979) as authority.

ARGUMENT

Petitioner was convicted January 13th, 1977 of charges stemming from an offense committed the 3rd day of November, 1976.

He entered the Florida Prison System about the 8th day of March, 1977 and was there given 900 days "gain time" and informed he would have to serve 1655 days minus any "additional earned gain time". His release date was fixed at May 20, 1981.

Subsequently, he was credited with 97 days "additional earned gain time" and his date of expiration was changed to February 7, 1981 (See Exhibit "A").

The 1978 session of the Florida Legislature repealed Statute 944.27, 944.271 and 944.29; - and enacted, in their places, Florida Statute 944.275. (Copies in Appendix).

A fair reading shows that the only difference in the Statute change is in the Statutory Gain Time allowed under 944.27 from 5 days per month for the first 2 years; 10 days per month for the second 2 years; and, 15 days per month for each succeeding year; - to 3 days per month for the first 2 years; 6 days per month for the second 2 years; and, 9 days per month for each succeeding year.

The new gain time law, enacted to take effect some twenty months after commission of the offense charged, changed the expiration date from February 7, 1981 to October 28, 1982.

The only question before the Court; can a State Legislature enact a law some twenty months after commission of an offense which adds 544 days to the penalty contemplated by law at the timeof the commission?

Such is obviously a direct violation of the requirement of Article I, Section 9 and Article I, Section 10, Constitution of The United States, that no state may enact or enforce an ex post facto law.

The Supreme Court of Florida not only condoned the unconstitutional application of that ex post facto law (Florida Statute 944.275) but was in conflict with The Supreme Court of Louisiana on the precise issue in two recent decisions of that Court.

In Curtis v State, 363 So 2d 1375 at 1383 that Court held:

> We must therefore conclude that our recent Wilson decision is incorrect and must be overruled. That the change in the law affecting the opportunity to earn a diminished sentence did not deprive a defendant of any vested right to good time does not alter the fact that the statute applies a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer (see Lindsey) and that it has the effect of making the standard of punishment "more onerous" through its effect on release eligibility (see Bullock). State v Curtis, 363 So 2d 1375 at 1383 (Appended)

On the 21st day of December, 1978 The Supreme Court of Louisiana, in its decision covering the exact situation here, ruled opposite to The Florida Supreme Court's holding in the instant case, stating:

> (1) statutory amendment requiring good time for inmates convicted after September 9, 1977 to be computed on basis of 15 days per month rather than the 25 days as before would violate ex post facto constitutional prohibitions if applied to persons who committed offenses on or prior to the date. . . State ex rel Bickman v Dees, 367 So 2d 283 at 284 (La. Dec. 21, 1978) (Appendix)

The decision in this case by The Supreme Court of Florida is in direct conflict with this Court's holding in:

> . . . .But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. Wolff v McDonnell, 94 S.Ct. 2963 at 2975 (Appendix).

The holdings of this, and other courts, have been so consistent that Florida's Supreme Court appears to be attempting to overturn the Federal Constitution in order to protect its Department of Corrections.

Realizing that Florida's Department of Corrections did recompute all release dates, regardless of date of offense or conviction and thereby applied the new gain time statute to some 20,000 inmates in an ex post facto manner at some cost to the Department; Respondent may not, through his Supreme Court, offer such monetary expenditures as a reason for the decision rendered in Besser v Graham, #57,021 Florida Supreme Court for, with many similar cases filed, the Court ruled:

> Per Curium:
> . . . .denied. See Harris v Wainwright, #56,716.

The text of the Harris decision, compared with Petitioner's Reply To Response in Besser v Graham, #57,021, shows that The Supreme Court of Florida did not decide the issue on the merits but relied entirely upon the Response filed by the Florida Attorney General (Appended with Opinions included).

For these reasons, Petitioner moves the writ issue.

Respectfully submitted,

William P. Besser

William P. Besser, pro se
Post Office Box 1100
Avon Park, Florida 33825

PROOF OF SERVICE

I, WILLIAM P. BESSER, do hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, IN CASE #57,021 has been furnised Attorney General Jim Smith, Counsel for Respondent, addressing same to his Tallahassee address, by United States Mail this the 27th day of November, 1979.

William P. Besser

William P. Besser, pro se

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IN THE UNITED STATES SUPREME COURT

WILLIAM P. BESSER,
PETITIONER

vs

ROBERT GRAHAM, GOVERNOR,
RESPONDENT

CASE NO._____

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, BESSER vs GRAHAM, 57021

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Supreme Court of Florida

No. 57,021

WILLIAM P. BESSER, Petitioner,

vs.

ROBERT GRAHAM, Governor, Respondent.

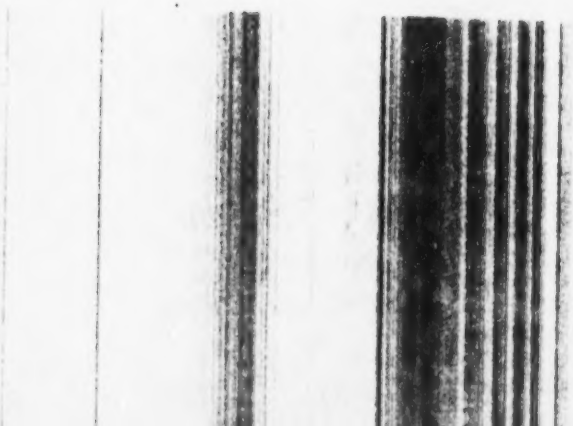
[November 1, 1979]

PER CURIAM.

The petition for writ of habeas corpus is denied. See Harris v. Wainwright, Case No. 56,716 (Fla. Nov. 1, 1979).

ADKINS, Acting Chief Justice, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.



Original Jurisdiction - Habeas Corpus

William P. Besser, in proper person, Avon Park, Florida,

for Petitioner

Jim Smith, Attorney General; and Wallace E. Allbritton,
Assistant Attorney General, Tallahassee, Florida,

for Respondent

Supreme Court of Florida

No. 56,716

HENNARD HARRIS, Petitioner,

vs.

LOUIE L. WAINWRIGHT, Respondent.

[November 1, 1979]

ADKINS, Acting Chief Justice.

In original habeas corpus proceedings, petitioner asserts that section 944.275 Florida Statutes (1978 Supplement) is unconstitutional as it is applied to him, in that he is harmfully required to remain in prison for an indeterminate number of months or years past the original expiration of the sentence under the law as it existed at the time of the offense. This statute, known as the "gain time statute" requires the Department of Corrections to grant deduction for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned.

Petitioner says that under the former law, section 944.27 Florida Statutes (1977) he was credited with all of his statutory gain time in advance at the time he was received into the custody of the Department of Corrections.

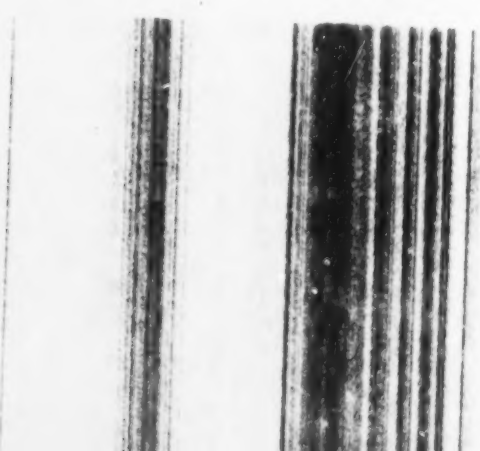
The new law (1978) is different from the former law (1977) in that there is an award of three days per month instead of five for the first two years; the award of six days per month instead of ten for the second two years; and the award of nine days per month instead of fifteen for anything over four years service of sentence.

Instead of awarding or crediting a prisoner with the statutory gain time at the old rate according to the number of years sentenced and time served, the Department of Corrections would credit such

gain time monthly (rather than in advance) at the new lesser rate and then only according to the number of years served. The "up front" awarding of gain time under the prior law was merely an administrative method by which an expiration date of sentence was tentatively calculated. Under either the old law or the new, gain time, whether it be what is normally considered "statutory" or "extra", only comes into play if a given inmate conducts himself in such a way as to deserve the gain time. Therefore, any notion of gain time can only be considered, at best, as conditionally vested.

Petitioner says that the statutory gain time credited in advance by the Department of Corrections under section 944.27, Florida Statutes (1977) was the custom by departmental rule and thus has become a vested right, at least insofar as petitioner is concerned. He says that the department entered into a binding contractual arrangement when petitioner entered prison that he would be able to receive and keep the statutory gain time in the absence of disciplinary problems. Petitioner contends that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since section 944.275, Florida Statutes (1978) permits the accumulation of a lesser amount of good time than did its predecessor, section 944.27, Florida Statutes (1977), then the application of the new statute to petitioner and the computation of his gain time makes the statute an ex post facto law as it was not in effect at the time petitioner was convicted and sentenced.

Appellate courts throughout the country have repeatedly recognized that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time in the absence of a legislative provision therefor. In other words, gain time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. See Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949) aff'd. 340 U.S. 880 (1950); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Kastel v. Fish, 36 F. Supp. 700 (D.C. Md. 1931); Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972) citing with approval Dear v. Mayo, 153 Fla. 116, 14 So.2d 267 (Fla. 1943); People ex rel. Coletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Lombersky v. Parole



Board of Department of Correction, 124 N.E.2d 521 (Mass. 1954).

Although section 944.275, Florida Statutes, was effective July 1, 1978, it was not implemented until January 1, 1979. This means that petitioner's gain time was computed under the provision of section 944.27, Florida Statutes (1977), until January 1, 1979, and thereafter computed pursuant to the provision of section 944.275, Florida Statutes (1978).

Mayo v. Lukers, 53 So.2d 916 (Fla. 1951) recognizes that the right to gain time is not a vested one and that it is obviously dependent on the course of the conduct of the inmate. This Court has emphasized the legislature's power to make whatever changes it deems prudent in the gain time procedure. In Dear v. Mayo, 153 Fla. 164, 14 So.2d 267 (Fla. 1943), this Court said that parole and gain time is granted by the sovereign as a matter of grace rather than of right and that the state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose. In Kimmons v. Wainwright, 338 So.2d 239 (1st DCA 1976), the court said that gain time is given to prisoners through the beneficence of the legislature, and the legislature has full authority to establish the terms and conditions thereof.

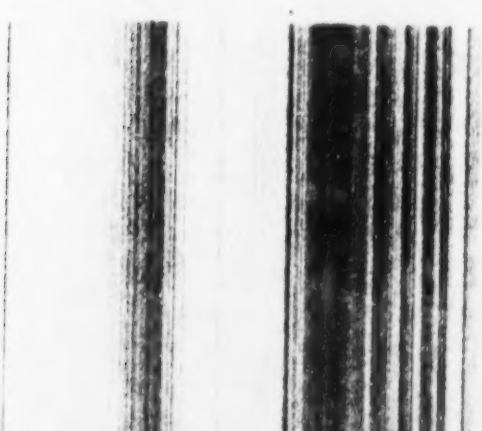
This is not a situation in which a new law has been passed eliminating the allowance of gain time in certain situations. Dowd v. Sims, 229 Ind.54, 95 N.E.2d 628 (Ind. 1950). This is not a situation in which the entire scheme of criminal penalties has been revised. Goldsworthy v. Hannifin, 86 Nev. 252, 468 P.2d 350 (Nev. 1970). It is not a situation in which the length of incarceration for juvenile offenders has been extended. In re Dewing, 564 P.2d 375 (Cal. 1977); In re Valenzuela, 79 Cal.Retr. 760, 275 Cal.App.2d 483 (3d Dist. 1969). Likewise, it is not a situation involving a new and different interpretation of existing law. Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972).

The petition for writ of habeas corpus is denied.

It is so ordered.

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concurring

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.



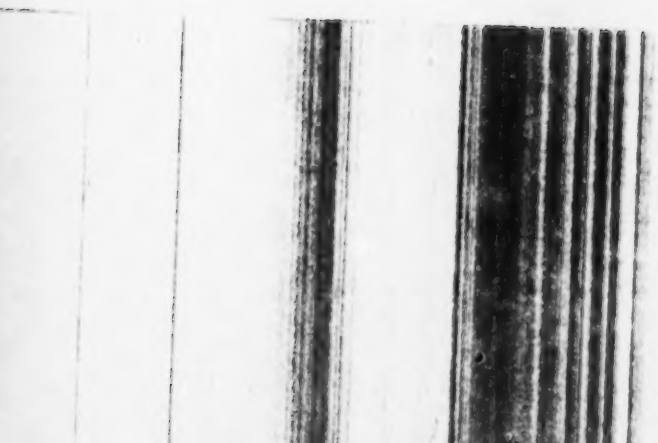
Original Jurisdiction - Habeas Corpus

Hennard Harris, in propar person, Raiford, Florida,

for Petitioner

Jim Smith, Attorney General; and A. S. Johnston, Assistant Attorney General, Tallahassee, Florida,

for Respondent



[illegible] Bail

[illegible] Availability of remedies

Requiring convicted defendant to pursue his motion to vacate sentence remedy in sentencing court does not violate this clause. Ching v. Mahoney, 4 A.Ind.1955, 230 F.2d 486.

28 U.S.C.A. § 2255 providing for vacation of sentence of prisoner by motion in court which imposed sentence, and providing that application for habeas corpus in behalf of prisoner authorized to apply for such relief shall not be entertained in absence of such motion does not violate this clause, but merely prescribes remedial procedure prerequisite to maintenance of habeas corpus proceeding. Wong v. Vogel, D.C.Ky.1948, 76 F. Supp. 723.

Although defendant who was convicted in Magistrates' Court might have questioned jurisdiction on appeal from judgment of conviction, in an orderly and regular method of procedure, he nevertheless could properly invoke habeas corpus for the same purpose. People v. Schillaci, 1959, 167 N.E.2d 630, 8 N.Y.2d 35, 201 N.Y.S.2d 97.

28. Review

Congress has power to direct that an accused person be taken immediately and without hearing before a court for trial and to preclude any appeal from an order dismissing a writ of habeas corpus, since a party to a suit has no "vested right" to an appeal. U. S. ex rel. Dilling v. McDonnell, C.C.A.10.1942, 130 F.2d 1012.

Section 9, Clause 3. Bill of attainder and ex post facto laws

No Bill of Attainder or ex post facto Law shall be passed.

Cross References

Relation of States, see section 10, clause 1, of this article.

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under local deed to difference between entire indebtedness and fair market value of property at time of [illegible] assessment as a "tender statute" as [illegible] to transactions entered into after passage, but is merely a limitation on creditor's recovery on court creditor fails to sell at fair market value. Kirkpatrick v. Sterling, 1940, 98 P.2d 599, 20 Cal.App.2d 658, appeal dismissed 61 S.Ct. 20, 311 U.S. 697, 85 L.Ed. 451, rehearing denied 61 S.Ct. 170, 311 U.S. 726, 85 L.Ed. 473.

A state statute providing that "all warrants drawn on the treasury shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received in payment of all taxes, debts, fines, penalties and forfeitures accruing to the county" was void. It is manifest that the legislature would have [illegible] A state statute [illegible] system of internal [illegible] the recovery of [illegible] to real estate, would be [illegible] Aided for the payment of [illegible] In anything but gold and silver [illegible] v. Beackmo, 1846, 8 Blackf., Ind. [illegible]

6. Stock as payment

Court cannot [illegible] direct creditor to accept stock [illegible] ment of debt. Cowell v. Metropolitan Inv. Co., C.C.A.N.Y.1931, 51 F.2d 27[illegible] on other grounds, 52 S.Ct. [illegible] 426, 77 L.Ed. 1293.

Section 10, Clause 1, continued. Bills of attainder: ex post facto law

* * * pass any Bill of Attainder, ex post facto Law, * * *

Cross References

For similar limitation upon Congress, see section 9, clause 3, of this Article.

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forfeiture; civil rights; prisoner not employee or entitled to compensation insurance benefits.

944.27 Gain-time for good conduct; schedule of allowances; cumulative sentences to be treated as one sentence for purposes of allowing and forfeiting.—

[1](1) The Department of Offender Rehabilitation shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentences of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him, to wit:

(a) Five days per month off the first and second years of the sentence;

(b) Ten days per month off the third and fourth years of the sentence; and

(c) Fifteen days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2) When a prisoner is under two or more cumulative sentences, the prisoner shall be allowed gain-time [2][and his gain-time,] including any extra gain-time allowed the prisoner under s. 944.29, shall be subject to forfeiture as though such sentences were all one sentence.

(3) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein. No inmate shall receive additional gain-time allowances under this section solely by virtue of participation in academic classroom instruction.

History.—s. 25, ch. 57-121; s. 18, ch. 61-530; s. 1, ch. 63-243; ss. 19, 35, ch. 69-106; ss. 1, 13, ch. 76-273.

[1]Note.—Repealed by s. 19, ch. 76-273 effective July 1, 1979.

[2]Note.—Bracketed words inserted by the editors to correct an apparent typographic error.

Cf.—s. 944.291 Prisoner released by reason of gain-time allowances.

944.271 Gain-time for labor performed; additional allowance; forfeiture.—Prior to January 1, 1979, the department is authorized to grant additional gain-time allowances on a monthly basis as earned up to 1 day off the sentence for each productive or institutional labor performed and after January 1, 1979, up to 1 day off the sentence for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned as part of an organized program of agricultural or mechanical labor in a correctional work program; provided, however, that no inmate shall receive additional gain-time allowances under this section solely by virtue of participation in any program of educational or classroom instruction unrelated to a correctional work program. Educational opportunities and classroom instruction unrelated to a correctional work program shall be available in addition to, but not in lieu of correctional work program developed by the department. Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned to him in the correctional work program in a faithful, diligent, industrious, orderly, and peaceful manner shall forfeit gain-time as provided in s. 944.28.

History.—s. 15, ch. 76-[illegible]

[1]**944.292 Suspension of civil rights.**—Upon conviction of a felony as defined in s. 10, Art. X of the State Constitution, the civil rights of the person convicted shall be suspended in Florida until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights granted pursuant to s. 8, Art. IV of the State Constitution.

History.—s. 28, ch. 74-112; s. 1, ch. 76-139.

[1]Note.—As amended, effective October 1, 1976.

[1]**944.293 Initiation of restoration of civil rights.**—With respect to those persons convicted of a felony, the following procedure shall apply: Prior to the time an offender is discharged from supervision, an authorized agent of the Department of Offender Rehabilitation shall obtain from the Governor the necessary application and other forms required for the restoration of civil rights. The authorized agent shall assist the offender in completing these forms and shall insure that the application and all necessary material are forwarded to the Governor before the offender is discharged from supervision.

History.—s. 29, ch. 74-112; s. 1, ch. 76-139.

[1]Note.—As amended, effective October 1, 1976.

944.49 Requirement of labor; compensation; amount; crediting of account of prisoner; forfeiture; civil rights; prisoner not employee or entitled to compensation insurance benefits.—

(1) The [1][Department of Offender Rehabilitation] shall require of every able-bodied prisoner imprisoned in any institution as many hours of faithful labor in each day and every day during his term of imprisonment as shall be prescribed by the rules and regulations of the [1][department].

(2)(a) Each prisoner who is engaged in productive work in any state correctional institution, program or facility under the jurisdiction of the department may receive for work performed such compensation as the department shall determine. Such compensation shall be in accordance with a schedule based on quality and quantity of work performed and skill required for performance, and said compensation shall be credited to the account of the prisoner or to the prisoner's family.

(b) Any monetary payments made directly to the prisoner shall be used in whole or in part to satisfy restitution ordered by a court of competent jurisdiction to the victim of the criminal act.

(c) It shall be the policy of the Department of Offender Rehabilitation to require inmates receiving compensation for work performed in community programs to reimburse the state for lodging, food, transportation, and other expenses incurred for sustaining the inmate. Reimbursement shall be according to rules promulgated by the department, which

Law Review Commentaries

Prisoners' gain time. 21 U.Fla.L.R. 103 (1968).

Procedural due process: Florida's Uniform Administrative Procedure Act. 21 U.Miami L.Rev. 145 (1966).

Library References

Prisons ⇐15. C.J.S. Prisons § 21.

Notes of Decisions

1. In general

Notwithstanding that board of commissioners of state institutions, being composed of all constitutional cabinet officers and the governor, had a great multitude of varied responsibilities, ultimate decisions for allowance or forfeiture of gain time by prisoners had to remain with the board, although board might designate director or deputy director to hold hearings and make recommendations. Nicholas v. Wainwright, 152 So.2d 458 (1963).

Prisoner was not entitled to early release on ground that gain time allegedly cancelled because of breaches in discipline had been illegally cancelled where gain time, to which prisoner claimed entitlement, had never been adopted by the board of commissioners of state institutions. Id.

944.29 Extra good time allowances

The division may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry.

Historical Note

Derivation:

Laws 1969, c. 69-106, §§ 19, 35.
Laws 1957, c. 57-121, § 27.

Laws 1969, c. 69-106, §§ 19, 35, transferred all powers, duties and functions of the division of corrections of the board of commissioners of state institutions to the division of adult corrections (now, division of corrections) of the department of health and rehabilitative services.

Law Review Commentaries

Parole in Florida. Vernon G. Clark, 11 U.Fla.L.R. 68 (1958).

Prisoners' gain time. 21 U.Fla.L.R. 103 (1968).

Notes of Decisions

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1. In general

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Since this section is the only law which authorizes the board of com-

Laws 1977, c. 77-120, a revisor's bill, amended this section to conform with Laws 1975, c. 75-49, which created the department of offender rehabilitation (see § 20.315) and transferred to the department certain functions performed by the division of corrections in the department of health and rehabilitative services and the parole and probation commission of the department of offender rehabilitation.

944.27 Repealed by Laws 1978, c. 78-304, § 2, eff. July 1, 1978

Prior to repeal, this section was amended by Laws 1976, c. 76-273, §§ 1, 19, and Laws 1977, c. 77-174, § 1. See, now, § 944.276.

Laws 1976, c. 76-273, § 19, which provided for repeal of subsec. (1), was by section 20 of the law to take effect January 1, 1979. Laws 1978, c. 78-304, § 3, effective July 1, 1978, amended Laws 1976, c. 76-273, § 20, to delete the exception which would defer the repeal of subsec. (1).

1. In general

There was insufficient time left on defendant's split sentence after period of imprisonment of 25 years to allow for maximum gain time and extra good time he could acquire during his five years of parole. Wright v. State, App., 342 So.2d 565 (1977).

Where defendant, resentenced pursuant to order of federal habeas corpus court, was not yet entitled to release with or without parole, any mutual intervention in the administration of the sentence would be premature. Baker v. State, App., 270 So.2d 424 (1972).

Where defendant appealing from resentencing which had been directed by federal habeas corpus court did not raise before trial court question whether or not he would be released unconditionally or on parole, record provided no basis for reviewing court to pass on the question. Id.

Laws 1976, c. 76-273, amending subsec. (1) of this section, pertaining to gain time, applies to all inmates of the department of offender rehabilitation, and not solely to those inmates committed to the custody of the department for offenses occurring after the effective date of the law. Op. Atty. Gen., 076-190, Sept. 15, 1976.

Person sentenced pursuant to § 775.087, is required to serve a minimum term of three years imprisonment before being eligible for parole. Such person is still entitled to both statutory and extra gain time allowances even to the extent that the individual may be released from incarceration on mandatory conditional release prior to service of three years' imprisonment. Op. Att. Gen., 075-202, July 9, 1975.

A prisoner sentenced pursuant to section 948.01(4), is entitled to earn time under this section for the specified period of the sentence imposed in accordance with section 948.01(4). Op. Att. Gen., 074-283, Sept. 19, 1974.

2. Forfeiture

Where prisoner, while serving two 12-year consecutive sentences, was released on parole and it was reincarcerated after such parole was revoked, prisoner's entire gain time was to be forfeited even though prisoner had completed serving first sentence at accumulated gain-time could properly have been attributed equitable to that sentence. Edmondson v. Wainwright, App., 378 So.2d 379 (1979), certiorari denied, 99 S.Ct. 142, 439 U.S. 842, 58 L.Ed.2d 140.

944.271 Repealed by Laws 1978, c. 78-304, § 2, eff. July 1, 1978

The repealed section, which provided an additional allowance in gain time for labor performed, was added by Laws 1976, c. 76-273, § 15. See, now, § 944.275.

944.275 Gain-time

(1) The Department of Offender Rehabilitation shall grant the following deductions for gain time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second year of the sentence.

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or additional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

errors in the trial but determined that no single error was sufficiently prejudicial to justify reversal. For example, in *Landsdown v. United States*, 348 F.2d 405 (CA 5 1965), the trial court admitted into evidence many irrelevant and prejudicial references and insinuations made by the prosecutor. The cumulative effect of these "harmless errors" required reversal.

In this jurisdiction in *State v. Sheppard*, 350 So.2d 615, 651 (La.1977), the defendant contended that if none of his 110 assignments of error individually warranted reversal of his conviction and sentence, taken together they indicated that defendant did not receive a fair trial. After carefully examining each of the 110 errors alleged, this court found them to be without merit and stated: "We are unwilling to say that the cumulative effect of assignments of error lacking in merit warrants reversal of a conviction."

[19] The record before us does not support defendant's complaint of numerous errors.

Assignment of Error No. 9 is without merit.

[20] Assignments of Error Nos. 3, 4 and 11 are neither briefed nor argued and are considered abandoned. *State v. Williams*, 362 So.2d 530 (1978).

For the reasons assigned, the conviction and sentence of defendant are affirmed.

CALOGERO, J., dissents and assigns reasons.

CALOGERO, Justice, dissenting.

I respectfully dissent. The negligent homicide statute provides that the violation of a statute or ordinance shall be considered only as presumptive evidence of the criminal negligence element of the crime. The use of the mandatory "shall" does not admit of the exercise of choice or discretion, but *requires* that such violation be considered presumptive evidence of that element (although admittedly only presumptive evi-

(1947) the term, "presumptive evidence", in R.S. 14:32 was found to mean that although a rebuttable presumption of criminal negligence would arise, the State would still have to prove that the negligent act was the cause of the homicide. The opinion then notes that the better interpretation of "presumptive evidence" is that it creates no legal presumption, but means only that the statutory violation related to the accident's cause justifies an inference of commission of a criminally negligent act.

In this case the jury was instructed that the presumption of criminal negligence flowing from a finding that there had been violation of a statute or ordinance was rebuttable and did not deprive the accused of the right of showing by evidence that he was free from criminal negligence even though he has violated a statute or ordinance.

I believe that the overall effect of the instructions to the jury, notwithstanding the restatement of the presumption of innocence and the state's burden of proving the element of criminal negligence beyond a reasonable doubt after the jury was instructed with regard to the "presumption", was to wholly relieve the State of showing "gross deviation below the standard of care expected to be maintained by a reasonably careful man", as required by the terms of the definition of criminal negligence set forth in R.S. 14:12. If reasonably careful men are expected to obey safety laws, every violation of a safety law should not be required to be equated with *gross* deviation below the reasonable man standard absent the production of evidence rebutting the dictated conclusion.

The jury here was not instructed that an *inference* of criminal negligence was *justified* but rather that a presumption of criminal negligence is mandated upon a finding of violation of a law or ordinance, which defense could only subsequently rebut. I believe that the defendant's right to have the state prove beyond a reasonable doubt every fact necessary to constitute negligent

STATE of Louisiana

v.

Richard CURTIS.

No. 61877.

Supreme Court of Louisiana.

Oct. 9, 1978.

Rehearing Denied Nov. 9, 1978.

Defendant was convicted before the Criminal District Court, Parish of Orleans, Matthew S. Braniff, J., of armed robbery and was sentenced as multiple offender, and he appealed. The Supreme Court, Calogero, J., held that: (1) quality of a victim's identification testimony was for jury to assess; (2) even if officers told such victim, at photographic lineup, that "We think we got the two guys," such would not have rendered the identification procedure impermissibly suggestive; (3) restricting defendant's voir dire by disallowing inquiry of a prospective juror, who had been a recent victim of armed robbery, as to whether she had also given testimony concerning that armed robbery and concerning identification was not error: (4) refusal to permit cross-examination of victim concerning his prior mistaken identifications of certain persons as the robbers at defendant's coparticipant's trial was error, but the error did not warrant reversal of conviction; (5) sentence of 198 years at hard labor, without entitlement of diminution of sentence for good behavior, was not "cruel, excessive and unusual" punishment in violation of state constitutional provisions, but (6) statute, which provides that persons sentenced as multiple offenders can be denied benefit or diminution of sentence for good behavior, could not be applied to such armed robbery offense, which had been committed prior to enactment of such statute, without violating ex post facto clauses of Federal and State Constitutions.

Judgment affirmed, case remanded for resentencing.

Sanders, C. J., dissented and adhered to

Marcus, J., concurred in part and dissented in part and assigned reasons.

Dixon and Dennis, JJ., would grant a rehearing.

Calogero, J., would grant a rehearing for the reasons expressed in his concurring opinion in *State v. Wilson*, 363 So.2d 445.

1. **Criminal Law ⇐741(2)**

In proceeding in which defendant was convicted of armed robbery, quality of in-court identification of defendant by victim, who had identified a person other than defendant's coparticipant as one of the armed robbers at the police lineup and who later identified another person as one of the robbers at co-participant's trial, was for jury to assess.

2. **Criminal Law ⇐339.7(3)**

Even if police officers told an armed robbery victim, at a photographic lineup, that "We think we got the two guys," such would not have rendered identification procedure impermissibly suggestive, in light of fact that common sense would warrant victim of the crime in believing as much and that there was an independent source for victim's in-court identification of defendant consisting of fact that victim was able to get a good, unobstructed look at defendant during course of the armed robbery which occurred in full daylight at close quarters.

3. **Jury ⇐131(6)**

In armed robbery prosecution in which defense counsel was permitted to determine during voir dire that prospective juror had been victim of an armed robbery about one year prior to being called to jury duty and that she did not believe that having been such a victim would influence her, refusal to permit defense counsel to inquire of such juror as to whether she had also given testimony concerning the armed robbery in which she was involved and concerning identification was not error.

4. **Criminal Law ⇐1170½(1)**
Witnesses ⇐379(2)

In prosecution for armed robbery, re-

amine a victim as to his prior mistaken identifications of certain persons as the robbers in defendant's coparticipant's trial was error, but the error did not warrant reversal of conviction, in light of fact that counsel was permitted and did establish the point he had been trying to develop in the disallowed cross-examination.

5. Criminal Law ⇐1213

Sentence of 198 years at hard labor, without entitlement to diminution of sentence for good behavior, for armed robbery offense committed by a second offender was not "cruel, excessive and unusual" in violation of State Constitution. LSA–Const. art. 1, § 20.

See publication Words and Phrases for other judicial constructions and definitions.

6. Constitutional Law ⇐203
Prisons ⇐15(2)

Statute, which provides that person sentenced as a multiple offender can be denied benefit of diminution of sentence for good behavior, could not be applied to a defendant, who was convicted of armed robbery offense committed prior to enactment of such statute, without violating ex post facto causes of Federal and State Constitutions; overruling *State v. Wilson*, 367 So.2d 166. LSA–R.S. 15:571.3, 15:571.2, subds. B, C, C(1, 2), 15:571.4, subd. B; U.S. C.A.Const. art. 1, § 9; LSA–Const. art. 1, § 23.

John Wilson Reed, New Orleans, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., Louise Korns, Asst. Dist. Atty., for plaintiff-appellee.

CALOGERO, Justice.

On February 21, 1975 Victor Graziano was preparing to open his regular Friday check-cashing business in the rear of Trump's Service Station at the intersection of S. Claiborne Avenue and Toledano Street in New Orleans. He had arrived at the business in his automobile with $8,000.00 in cash and various supplies. He was met there by Jacob Harris, a part-time security guard. Graziano and Harris were in the process of unloading the automobile and entering the building when they were approached by two black males, one armed with a pistol, who indicated that it was a holdup. Harris, startled, dropped the box he was carrying; in an apparent response, the robber with the gun shot Graziano in the hand. The robbers then relieved Harris of his sidearm, grabbed the moneybag containing the $8,000.00, and ran off. During the robbers' flight there was an exchange of gunfire between them and Graziano. The investigating officers, attempting to trace the path of the robbers' flight, found the gun used by the robbers, the gun taken from Harris, small droplets of blood on the sidewalk and a witness who had seen two black men jump into a car driven by a third person. The witness had recorded the license plate number and the car was subsequently discovered parked some distance away with blood stains on the seat and door.

In separate bills of information, allotted to separate sections of the Criminal District Court, the appellant Richard Curtis and one Charles Jackson were charged with this armed robbery. The cases proceeded independently and Charles Jackson was tried and convicted in November, 1975. His conviction has been affirmed in this Court, *State v. Jackson*, 347 So.2d 172 (La.1977). The appellant Richard Curtis was tried by jury on April 6, 1976 and found guilty as charged. He was sentenced as a multiple offender to serve one hundred ninety-eight years at hard labor in the custody of the Louisiana Department of Corrections without diminution of sentence for good behavior. Before this Court, defendant relies upon five assignments of error for reversal of his conviction and sentence. The remainder of defendant's assignments, not being briefed, are considered abandoned.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error defendant asserts that the court erred in denying defendant's written motion to suppress identifications. That motion sought to suppress in-court identifications and all pretrial photographic, lineup, show-up and other identifications of the defendant on the grounds that the identification procedures were suggestive, that the pre-trial identifications were unnecessary and impermissible devices to avoid the lineup requirement of counsel mandated by *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) and that the pre-trial identifications are of such doubtful reliability that their admission into evidence would be so prejudicial to the defendant as to deny due process.

The day following the robbery Mr. Graziano, who was hospitalized with a gunshot wound of the hand and wrist, selected defendant Richard Curtis' photograph from a group of pictures shown him by the police, and, without suggestion or prompting of any kind, positively identified Curtis as the robber who had shot him in the hand and disarmed Harris. Graziano was not able to identify Charles Jackson because he had not seen Jackson's face at the time of the crime, and only caught sight of Jackson's back as the latter lifted the bag of money out of the car. Also, at the *police lineup* held on March 20, a month after the commission of the crime, *Graziano* identified Richard Curtis.

The police displayed a group of photographs to Jacob Harris on February 25, four days after the armed robbery, and Harris identified the pictures of both Richard Curtis and Charles Jackson as the perpetrators of the instant crime. However, because of illness, Jacob Harris was not able to attend the police lineup on March 20. (Tr. 92 et seq.)

In brief defendant's attacks with respect to identification deficiencies are leveled at the rulings relative to the identifications and testimony of Jacob Harris. Appellant relies on the fact that according to Harris' testimony, Harris was told by the police officers who brought him some photographs four days after the commission of the crime, "We think we got them two guys," which was suggestive, according to appellant, and on the further fact that at a June 4, 1975 police lineup in which Charles Jackson was displayed but Richard Curtis was not Harris identified one Irvin Windham rather than Jackson as one of the armed robbers, and later at Jackson's trial identified one Joseph Duncan as one of the robbers.

[1] First of all we find no support in the record for the contention that any pre-trial identification was designed to avoid lineup requirements of counsel mandated by *Gilbert v. California*. *See State v. Wallace*, 285 So.2d 796 (La.1973). Harris' exposure to the photographic lineup occurred four days post robbery and before defendant had been arrested. When the police lineup was conducted and the defendant was identified by Graziano, Harris was unable because of illness to attend. The defense contention that the pre-trial identifications by Harris were so unreliable as to deny defendant due process is likewise without merit. The quality of Harris' testimony was for the jury to assess.

[2] Defendant's chief reliance is upon Harris' testimony that at that first photographic lineup the police officers told him "We think we got them two guys."

First of all we are more impressed with and inclined to believe to be more accurate in this case the testimony of the police officers that no such suggestive statement was made to Harris by them. Even assuming, however, the accuracy of Harris' testimony, under our jurisprudence there is no merit to the contention. In *State v. Knight*, 323 So.2d 765 (La.1975) we held that the statement of police officers at the time of identification that they have a suspect does not justify a conclusion that the procedure used was impermissibly suggestive, as common sense would warrant the victim of the crime in believing as much.

Furthermore, there was an independent source for Harris' in-court identification of Richard Curtis in that Harris was able to get a good, unobstructed look at Curtis during the course of the armed robbery,

11:15 a. m.) at close quarters, Curtis' face not being covered or disguised in any fashion.

Assignment of error number one is without merit.

ASSIGNMENT OF ERROR NO. 2

[3] Defendant complains of the court's restricting defendant's voir dire by disallowing inquiry of a prospective juror, who had been a recent victim of an armed robbery, into whether she had also given testimony concerning that armed robbery and concerning identification.

Defense counsel was permitted to determine that the witness in question had been a victim of an armed robbery about one year prior to being called for jury duty in the present case and that she did not believe that having been a victim of an armed robbery would influence her in the present case.

Defense counsel did not before or after the court's ruling apprise the court of the purpose of the only partially stated and disallowed question which he contends concerned itself with the juror's prior involvement in a trial involving identification issues.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NO. 3

[4] Defendant here contends that the trial court erred in interfering with and restricting the defense cross examination of Jacob Harris in such a way as to adopt the prosecution's thesis that the witness' multiple misidentifications were unimportant to the present case.

Specifically he says that he should not have been shut off when he attempted to cross examine Harris about his prior identifications of two persons as the perpetrators of the armed robbery—Charles Jackson by an in-court identification and Joseph Duncan by a photographic identification. The court erred in shutting off cross-examination of Harris concerning prior mistaken mistakes had taken place in the earlier trial of defendant's co-perpetrator Jackson. The complaint is well taken. Effort to show the witness' earlier mistakes as to persons whom he thought were the robbers should have been permitted. However, we do not consider this trial error of sufficient magnitude to warrant reversal of the conviction in light of the fact that independently of this particular effort at cross-examination defendant was permitted to and did establish the point counsel was trying to develop in the disallowed cross-examination. The testimony of Sergeant Orin Mills that Jacob Harris had positively identified Irvin Windham, a fill-in at a June 4, 1975 lineup, established that Harris had made at least one prior mistaken identification. Additionally defense counsel was allowed to read from the transcript of Charles Jackson's trial portions of Harris' testimony in which he identified Joseph Duncan from a photograph as one of the individuals who perpetrated the robbery.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NO. 12

[5] Defendant received as a second offender convicted of armed robbery a sentence of one hundred ninety-eight years at hard labor without entitlement of diminution of sentence for good behavior. He contends that the sentence is illegal because cruel, excessive and unusual under Article I, Section 20 of the Louisiana Constitution of 1974. The contention is without merit. *See, State v. Cobbs*, 350 So.2d 168 (La.1977); *State v. Harvey*, 329 So.2d 731 (La.1976); *State v. Walker*, 328 So.2d 87 (La.1976).

ASSIGNMENT OF ERROR NO. 11

[6] In this assignment defendant complains that assuming his sentence of one hundred ninety-eight years is otherwise valid it should not have been without benefit of diminution of sentence for good behavior.

He contends that the statute employed to

legislature after commission of the crime for which sentenced and that application of the statute to him constitutes an ex post facto application prohibited by both the United States and Louisiana Constitutions.

The armed robbery took place February 21, 1975. As of that date persons sentenced on an armed robbery conviction and other felonies, whether first or multiple offender, were afforded the benefit of diminution for good behavior in the discretion of the director of corrections under the provisions of R.S. 15:571.3(B).

In 1975 the legislature amended R.S. 15:571.3 to provide in subsection C that a person sentenced as a multiple offender after September 15, 1975 could, on order of the court, be denied benefit of diminution of sentence for good behavior.[1] Defendant was convicted in April, 1976 and was sentenced in May, 1976. After the trial judge sentenced defendant to one hundred ninety-eight years, the state moved the court to order that the defendant be denied the benefit of diminution of his sentence for good behavior. The trial judge granted the motion and attached to defendant's sentence the condition that it would be without benefit of diminution for good behavior.

Very recently this Court had occasion to review a contention similar to that put forth here but as it related to application of the 1977 statute (see footnote one above) which *mandated* the denial of good time diminution. In *State v. Wilson*, 360 So.2d 166 (La.1978) we held that applying that 1977 act to a defendant whose offense had been committed prior to its enactment but whose sentence was imposed after the effective date of the law was not an unconstitutional ex post facto application of the law.

The distinction between *Wilson* and the case under consideration is without a significant difference.[2] The premise in the *Wilson* opinion was that the statute mandating denial of good time opportunity did "not deprive the class of defendants within its coverage of any vested right to good time." While that of course is true, our opinion failed to recognize that the retrospective change is not in any right to *earned* good time but in the right *to be eligible* to earn good time, that is, the right of the inmate *to try* to earn a reduction of his sentence.

That the law has been changed to the defendant's disadvantage, after commission of the crime, is unquestioned. The pertinent inquiry is whether this type of change, of substantial consequence,[3] is the type of retroactive law which is banned by the ex post facto clause.

1. That provision, added by Acts 1975, No. 727, § 1, is now embodied in R.S. 15:571.3(C)(1), with the amendment that it applies only prior to September 9, 1977. In the summer of 1977, the Legislature added yet another provision R.S. 15:571.3(C)(2) providing that multiple offenders sentenced after September 9, 1977 shall in no case be entitled to time off for good behavior. By the terms of the original enactment, R.S. 15:571.3(C), now (C)(1), was applicable only to persons convicted under the multiple offender law after September 15, 1975 Acts 1975, No. 727, § 3.

2. *Wilson* under the 1975 law, at time of commission, could have, on motion of the state been sentenced without benefit of good time diminution opportunity; no such motion was filed, the judge thus did not deny the opportunity, in his discretion, under the pre-1977 law. Defendant would have been eligible (absent trial judge's contrary determination) for grant of was for this reason the judge sentenced him without benefit of good time diminution. Defendant Curtis, on the other hand, under the law at time of commission of his offense was unconditionally entitled to the benefit of discretionary good time. But having been sentenced after the 1975 law went into effect by a trial judge who granted the state's motion to deny him good time, he suffers the same fate as Wilson in that he is denied the opportunity to earn diminution while imprisoned. In both cases, *Wilson* and *Curtis*, there has been a denial of the opportunity to earn good time diminution by the application of laws passed after the dates the respective crimes were committed.

3. Absent the trial court's denying opportunity for diminution on motion of the state, the law would permit a maximum credit of good time of approximately forty-five percent, "twenty-

The language of the United States and Louisiana Constitutions is quite brief. Article I, Section 9 of the United States Constitution provides:

> No bill of attainder or ex post facto law shall be passed.

Article I, Section 23 of the Louisiana Constitution of 1974 similarly provides:

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

In the first United States Supreme Court discussion of the ex post facto prohibition, Justice Chase concluded that the clause proscribes, among other types of laws, "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). In subsequent cases, it has been stated that an ex post facto law is one that "renders an act punishable in a manner it was not punishable when committed." *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 138, 3 L.Ed. 162 (1810). *See Garner v. Board of Public Works*, 341 U.S. 716, 735, 71 S.Ct. 909, 95 L.Ed. 1317 (1951). Employing these and similar definitions, courts have held that the clause prohibits legislatures from retroactively increasing punishment for past criminal acts. *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937).

A major principle underlying the ex post facto proscription is that laws which adversely affect individuals who have committed particular past acts fail to provide a fair warning of the extent to which that person can be punished; furthermore, retroactive legislation frustrates reliance upon existing law and does not serve an object of the criminal law by providing guidance for conduct. By proscribing retroactive criminal legislation, *Calder* and the federal jurisprudence which followed have limited the ends for which the legislature may use the criminal law: the legislature may not punish when no law has been violated and may not use the criminal law for retribution except

In applying the ex post facto prohibitions the courts have struck down as unlawful increases in punishment, retroactive changes in the post conviction treatment of individuals. In *In re Medley*, 134 U.S. 160, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890) a statute passed subsequent to the offense required that while awaiting execution a defendant remain in solitary confinement in the state penitentiary; the law applicable at the time of the offense provided that while awaiting execution a defendant should simply be confined in the county prison. With execution of the defendant about to take place the United States Supreme Court nevertheless took the occasion to declare unconstitutional, as an ex post facto law, the requirement that the defendant await his death in solitary confinement in the state penitentiary rather than in the county prison. Said the court, in passing,

> ". . . it may be said that any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or *which alters the situation of the accused to his disadvantage*." (emphasis added)

In a more recent case, *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), the United States Supreme Court invalidated a Washington statute as ex post facto legislation which had the effect of making defendant's punishment more severe because of its effect on the sentence he would serve. The law in effect at the time of his offense provided a penalty of not less than six months and not more than fifteen years. The statute was amended after the offense to require the court to impose a fifteen year sentence, with the parole board having the obligation to set a determinate sentence of no less than six months and no more than fifteen years. The Washington State Supreme Court upheld the statute finding that because the maximum and minimum sentences before and after the offense were

er punishment. Disagreeing with that approach, the United States Supreme Court observed:

> "The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen-year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. *The Constitution forbids the application of any punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. Kring v. Missouri, supra* [107 U.S. 221], 228–229, 2 S.Ct. 443, 27 L.Ed. 506; *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 33 L.Ed. 835; *Thompson v. Utah*, 170 U.S. 343, 351, 18 S.Ct. 620, 42 L.Ed. 1061. It is for this reason that an increase in the possible penalty is ex post facto, *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648; *Cummings v. Missouri, supra* [4 Wall. 277], 326, 18 L.Ed. 356; *Malloy v. South California*, 237 U.S. 180, 184, 35 S.Ct. 507, 59 L.Ed. 905, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier, *State v. Callahan*, 109 La. 946, 33 So. 931; *State v. Smith*, 56 Or. 21, 107 P. 980.
>
> Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. *Marion v. State*, 16 Neb. 349, 20 N.W. 289. Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime, *see Calder v. Bull, supra*, 3 Dall. 390. *It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.*" (emphasis added)

Changes in the availability of parole (*In re Griffin*, 63 Cal.2d 757, 48 Cal.Rptr. 183, 408 P.2d 959 (1965)), and restrictions on the availability of bail on appeal (*Greene v. State*, 238 So.2d 296 (Fla.1970)) have run afoul of the ex post facto prohibition. *And more directly pertinent*, laws effecting retroactive changes in availability of good time benefits have also been found in violation of the ex post facto prohibition. *State ex rel. Nelson v. Ellsworth*, 142 Mont. 14, 380 P.2d 886 (1963).[4]

In the jurisprudence of this state until the recent *Wilson* decision there had been no case directly concerning the ex post facto law proscription and retroactive laws relative to good time (eligibility for diminution of sentence). There have, however, been analogous cases treating retroactive laws concerning eligibility for parole or probation.

In *State ex rel. Woodward v. Board of Parole*, 155 La. 699, 99 So. 534 (1924), a defendant, sentenced to life imprisonment under a statute which provided for eligibility for parole, petitioned for relief when a

4. But *see Singleton v. Wolfe*, 313 F.Supp. 1094

subsequently enacted statute eliminated the eligibility for parole. Relying on *In re Medley, supra*, this Court found the denial of parole eligibility unconstitutional:

"There can be no doubt but that the right to be considered for a parole, after the expiration of one-third of the actual time required to be served, with the benefit of commutation under other laws (in his case something in excess of three years), was a substantial one; for otherwise he would be compelled to continue at hard labor under the rules of the penitentiary just three times as long as would have been the case, had the board seen fit, after the expiration of the limit fixed by the Act of 1914, to grant him a parole. There can be no comparison between such a condition, and the right to go at liberty and pursue a livelihood under the restrictions of a parole. Of course, the right was not absolute or fixed in the sense that he was bound to be paroled; but the privilege of having his case submitted to the discretion of the board at the proper time did exist; whereas, now, it is entirely taken away, and the board cannot even consider it under the present law.

It would seem clear, therefore, that to give the Laws of 1916 a retrospective effect would operate seriously to his disadvantage, in violation of the inhibition of the Constitution against ex post facto laws."

And in *State v. Bullock*, 263 La. 946, 269 So.2d 824 (1972), the state attempted to apply a statute that allowed a jury to impose a life sentence without benefit of parole, probation, commutation or suspension of the sentence. At the time of defendant's offense, there was no provision allowing the jury to attach those conditions to the sentence. Finding this to be an ex post facto application of the law, this Court stated:

"Under long established principle, the prohibition against ex post facto laws includes not only those laws which 'make acts criminal though done before the enactment made them unlawful, but also it prohibits the enforcement of any enactment which changes the punishment, as authorized for the crime when committed. *See: Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798), and the similar interpretation uniformly given by later jurisprudence; 1 Antieau, Modern Constitutional Law § 5:133 (1969). 'The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer.' *Lindsey v. State of Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937).

Thus, this court has held that a subsequent enactment which abolished a prior right of parole was null as an ex post facto enactment insofar as applied to persons convicted for offenses committed prior to it. *State ex rel. Woodward v. Board of Parole*, 155 La. 699, 99 So. 534 (1924). See also, e. g., *Lindsey v. State of Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1934) and *In Re. Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890).

If this same prosecution for a 1966 offense had been remanded or retried prior to enactment of the 1972 act, the defendant had available, if he received a life sentence, the same right to apply for commutation or parole then applicable to all life sentences. The ex post facto prohibitions of our state and federal constitutions forbid applying the 1972 act to offenses committed prior thereto so as to permit the imposition of life sentences subject to more stringent conditions. Thus, in *Lindsey v. State of Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), the United States Supreme Court invalidated a state statute, as ex post facto legislation, which had the effect of making the standard of punishment 'more onerous', 301 U.S. 400, 57 S.Ct. 798, through its effect on, inter alia, parole and release eligibility."

There is no analytical distinction between eligibility for parole (and analogously probation) and eligibility for diminution of sentence through good time. In neither situation is there a vested right. Indeed at the time of commission of the offense in each

ty for an accused later convicted that during the course of serving his sentence he will be able to try to earn early release from confinement. In each case "release eligibility" (a phrase used in *Lindsey v. Washington, supra* and quoted in *State v. Bullock, supra*) is significantly affected. These are not "minor changes in the handling of prisoners," measures which should not automatically trigger application of the ex post facto laws. See 73 Michigan Law Review, 1503.

We therefore conclude that our recent *Wilson* decision is incorrect and must be overruled. That the change in the law affecting the opportunity to earn a diminished sentence did not deprive a defendant of any vested right to good time does not alter the fact that the statute applies a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer (see *Lindsey*) and that it has the effect of making the standard of punishment "more onerous" through its effect on release eligibility (see *Bullock*).

Accordingly, applying R.S. 15:541.3(C) in the sentencing of defendant Curtis after, but for a crime committed before, its effective date, violates the ex post facto clauses of the United States and Louisiana Constitutions. The sentence insofar as it is without benefit of diminution of sentence for good behavior is illegal. The case will therefore be remanded to the trial court for a resentencing.

Decree

For the foregoing reasons, the conviction of defendant Curtis is affirmed. The case is remanded to the trial court for resentencing in accordance with law and the opinion of this Court.

JUDGMENT AFFIRMED; CASE REMANDED FOR RESENTENCING.

SANDERS, C. J., dissents adhering to the holding of *State v. Wilson*, La., 360 So.2d 166 (1978).

MARCUS, J., concurs in part and dissents in part and assigns reasons.

MARCUS, Justice (concurring in part and dissenting in part).

I concur in the affirmance of defendant's conviction. I dissent from the reversal of his sentence and remand for resentencing for reasons set forth in *State v. Wilson*, 360 So.2d 166 (La.1978).

WEST PUBLISHING CO. KEY NUMBER SYSTEM

Raymond D. Fuljenz, Lake Charles, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Frank T. Salter, Dist. Atty., Adam L. Ortego, N. Pizzolatto, Asst. Dist. Attys., for plaintiff-appellee.

PER CURIAM.

Affirmed.

TATE, J., dissents in part with CALOGERO and DENNIS, JJ., concurring in dissent.

TATE, Justice (dissenting in part).

The conviction should be affirmed, but conditioned on the result of a remand for a hearing on the motion to suppress the victim's identification testimony as tainted. The hearing was denied because of the alleged untimely filing of the motion in the trial court.

STATE of Louisiana

v.

Byron HILLIN.

No. 62224.

Supreme Court of Louisiana.

Dec. 15, 1978.

Appeal from Criminal District Court, Parish of Orleans; Frank A. Marullo, Jr., Judge.

John M. Lawrence, Orleans Indigent Defender Program, New Orleans, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., Maurine A. Carroll, Asst. Dist. Atty., New Orleans, for plaintiff-appellee.

PER CURIAM.

The defendant Hillin was convicted of forcible rape, La.R.S. 14:43.1 and sentenced to six years imprisonment at hard labor. His appeal raises fourteen assignments of error, comprising eleven arguments.

We find that none of the assignments present reversible error, no do any involve legal issues not governed by clearly applicable legal principle. Some of the assignments require lengthy factual discussion of interest primarily to the parties, but not involving circumstances likely to recur. We have therefore discussed and disposed of them in an appendix attached to this opinion, which remains a public record of this Court but which will not be published with this opinion.

Accordingly, we affirm the conviction and sentence.

AFFIRMED.

STATE of Louisiana

v.

Pinnel LOMAX.

No. 62416.

Supreme Court of Louisiana.

Dec. 15, 1978.

Defendant was convicted in the Twenty Fourth Judicial District Court, Parish of Jefferson, Frank V. Zaccaria, J., of armed robbery, and he appealed. The Supreme Court, Dixon, J., held that: (1) evidence was sufficient to support the conviction, and (2) defendant was not denied his constitutional right to a speedy trial.

1. **Criminal Law ⇐1163.1(9)**

At trial on armed robbery charge, no prejudicial error resulted from the trial court's allowing assertedly inadmissible evidence and hearsay testimony to be admitted. LSA-R.S. 14:64.

2. **Robbery ⇐24.1(3)**

Evidence was sufficient to support conviction of armed robbery. LSA-R.S. 14:64.

3. **Criminal Law ⇐577.4**

Defendant, charged with armed robbery, was not denied his constitutional right to a speedy trial.

Ernest V. Richards, IV, Metairie, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara B. Rutledge, Asst. Atty. Gen., John M. Mamoulides, Dist. Atty., Robert Pitre, Abbott J. Reeves, Asst. Dist. Attys., for plaintiff-appellee.

DIXON, Justice.

Defendant Pinnel Lomax was charged by bill of information with armed robbery in violation of R.S. 14:64. On February 3, 1976 the jury found defendant guilty as charged; on February 10, 1976 defendant was sentenced to twenty years at hard labor without benefit of parole, probation or suspension of sentence. On appeal defendant assigns three errors.

[1-3] Defendant contends that prejudicial error resulted from the trial judge's allowing inadmissible evidence and hearsay testimony to be admitted into evidence. Defendant also argues that the evidence at trial was not sufficient to support a verdict of guilty and that he was denied his constitutional right to a speedy trial by the denial of a speedy trial.

Having reviewed these assignments of error, this court finds them to be without merit and, accordingly, affirms defendant's conviction and sentence.

STATE of Louisiana ex rel. Joseph BICKMAN

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

STATE of Louisiana ex rel. Kent BELL

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

STATE of Louisiana ex rel. Ray STEVENS

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

STATE of Louisiana ex rel. Glenn WADE

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

STATE of Louisiana ex rel. Keith CORNELL

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

STATE of Louisiana ex rel. David GIFFORD

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

STATE of Louisiana ex rel. Robert N. PAULHUS a/k/a Robert N. O'Brien

v.

CUSTODIAN OF RECORDS OF LOUISIANA STATE PENITENTIARY, C. Paul Phelps, Secretary, Department of Corrections, Frank Blackburn, Warden

STATE of Louisiana ex rel.
Nelson MANUEL

v.

C. Paul PHELPS, Secretary, Department of Corrections.

STATE of Louisiana ex rel.
Bruce HINKLEY

v.

C. Paul PHELPS, Secretary, Department of Corrections.

Nos. 62496, 62696, 62717, 62800, 62802, 62918, 62969, 63069 and 63072.

Supreme Court of Louisiana.

Dec. 21, 1978.

Consolidated cases came before the Supreme Court on writs of review to the Criminal District Court, Parish of Orleans, Bernard J. Bagert, Sr., Charles R. Ward and Rudolph F. Becker, III, JJ., the 14th Judicial District Court, Parish of Calcasieu, Henry L. Yelverton, J., the 20th Judicial District Court, Parish of West Feliciana, William F. Kline, Jr., J., and the 19th Judicial District Court, Parish of East Baton Rouge, Douglas M. Gonzales, J. The Supreme Court, held that: (1) statutory amendment requiring good time for inmates convicted after September 9, 1977 to be computed on basis of 15 days per month rather than the 25 days as before would violate ex post facto constitutional prohibitions if applied to persons who committed offenses on or prior to the date but who were convicted subsequent to it so that controlling date for application of amendment is date the offense was committed; and (2) statute providing for forfeiture of good time earned on portion of sentence served prior to parole if parole is revoked would violate ex post facto prohibitions if applied to person paroled prior to statute's effective date, but it is not an ex post facto law when applied to inmates paroled thereafter so that date of parole, rather than date of commission of offense, triggers application of the forfeiture provisions.

[illegible] consolidated cases and cases

Sanders, C. J., and Marcus, J., dissented, adhering to their dissent in *State v. Curtis*, 368 So.2d 1375 (La.1978).

Summers, J., dissented.

1. Prisons ⇐15(3)

Any person convicted of felony committed on or prior to September 15, 1975, is eligible for diminution of sentence for good behavior regardless of nature of his offenses and whether or not he had been adjudged a habitual offender. LSA–R.S. 15:571.3, 15:571.3, subds. B, C, 15; LSA–Const. art. 3, § 19.

2. Prisons ⇐15(3)

Any person who has committed a felony between September 16, 1975 and September 9, 1977 inclusive, who has been convicted one or more times of one of offenses enumerated in statute relating to eligibility for diminution of sentence for good behavior and who is sentenced as habitual offender is eligible for good time, unless he is specifically denied such eligibility upon order of sentencing court. LSA–R.S. 15:571.3, 15:571.3, subds. B, C, 15; LSA–Const. art. 3, § 19.

3. Prisons ⇐15(3)

Any person who has committed felony on September 10, 1977 or thereafter, who has been convicted one or more times of one of offenses enumerated in statute relating to eligibility for diminution of sentence for good behavior and who is sentenced as habitual offender is automatically denied eligibility for diminution of sentence for good behavior. LSA–R.S. 15:571.3, 15:571.3, subds. B, C, 15; LSA–Const. art. 3, § 19.

4. Constitutional Law ⇐203
Prisons ⇐15(2)

Statutory amendment requiring good time for inmates convicted after September 9, 1977 to be computed on basis of 15 days per month rather than 25 days as before would violate ex post facto constitutional prohibitions if applied to persons who committed offenses on or prior to the date but who were convicted subsequent to it; thus controlling date for application of amendment is date offense was committed. LSA R.S. 15:571.4, subd. C; U.S.C.A.Const. art. 1, § 9; LSA–Const. art. 1, § 23.

5. Statutes ⇐223.2, 223.4

Where two statutes deal with same subject matter, they should be harmonized if possible, but, if there is conflict, statute specifically directed to matter at issue must prevail as exception to statute more general in character.

6. Pardon and Parole ⇐2

Statute providing that, upon revocation of parole, offender will forfeit good time earned prior to parole and that forfeiture provision shall be retroactive is controlling statute as to forfeiture of good time, rather than prior statute providing that, upon revocation of parole, parolee may be required to serve out full term for which he was sentenced, subject to deduction of time he had served prior to his parole and to any diminution of sentence for good behavior he earned or may thereafter earn. LSA–R.S. 15:571.4, 15:571.4, subd. B, 15:574.9.

7. Constitutional Law ⇐197

Any law passed after commision of offense which in relation to that offense, or its consequences, alters situation of party to his disadvantage is an ex post facto law. U.S.C.A.Const. art. 1, § 9; LSA–Const. art. 1, § 23.

8. Constitutional Law ⇐197

A major principle underlying ex post facto proscription is that laws which adversely affect individual who committed particular past acts fail to provide a fair warning of the extent to which that person can be punished and that retroactive legislation frustrates reliance upon existing law and does not serve an object of criminal law by providing guidance for conduct. U.S.C.A.Const. art. 1, § 9; LSA Const. art. 1, § 23.

9. Constitutional Law ⇐203
Pardon and Parole ⇐2

Statute providing for forfeiture of tence served prior to parole when parole is subsequently revoked violates ex post facto prohibitions when statute operates against person who was paroled prior to July 26, 1972, effective date of the statute, but it is not an ex post facto law when applied to inmates paroled thereafter; thus date of parole, rather than date of commission of offense, triggers application of the forfeiture provisions. U.S.C.A.Const. art. 1, § 9; LSA–Const. art. 1, § 23.

10. Criminal Law ⇐1181

If offense were committed prior to September 10, 1977, but after September 15, 1975, classification of sentences as without benefit of diminution of sentence for good behavior would be improper, requiring cases to be remanded for resentencing under discretionary authority vested with trial judge by law in effect at time of commission of offense and sentences should state whether trial judge considered petitioners entitled to diminution of sentence for good behavior. LSA–R.S. 15:571.3, subd. C, 15:571.4, subd. B.

11. Prisons ⇐15(4)

If offense were committed prior to September 10, 1977, good time allowance should be computed at rate of maximum of 25 days per month. LSA–R.S. 15:571.4, subd. B.

12. Criminal Law ⇐274(4)

Since petitioner was entitled to have diminution of sentence for good behavior computed on basis of 25 days per month pursuant to statute in effect at time of commission of his offense, rather than 15 days as allowed by later statute, he was not entitled to have his guilty plea declared void on theory that trial judge had informed him that his good time release date would be based on maximum of 25 days per month and that, if he were actually eligible for maximum of good time credit of only 15 days, his plea would be void. LSA–R.S. 15:571.4, subd. B.

13. Pardon and Parole ⇐14.11

If petitioners were released on parole

upon revocation of parole, they would not be entitled to complain of forfeiture of good time each had accumulated prior to parole, where they were both paroled after July 26, 1972 and were informed on date of release that, should they later have their parole revoked, they would forfeit good time earned on that portion of sentence served prior to parole. LSA–R.S. 15:571.4, subd. B.

PER CURIAM.

Recently this Court in *State v. Curtis*, 363 So.2d 1375 (La.1978), overruling its earlier decision in *State v. Wilson*, 360 So.2d 166 (La.1978), held that the application of amended provisions of La.R.S. 15:571.3(C), relative to denial of eligibility for diminution of sentence for good behavior, to a defendant who committed the underlying offense prior to enactment of the statute, but who was sentenced thereafter, violates the ex post facto prohibitions contained in both the United States and Louisiana Constitutions. *See* U.S.Const. art. I, § 9; La. Const. art. I, § 23 (1974). While the change in the law does not deprive defendants of any vested rights, we concluded that it does operate to apply "a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer and that it has the effect of making the standard of punishment 'more onerous' through its effect on release eligibility." *State v. Curtis, supra* (citations omitted).

These nine consolidated cases, before the Court on petitions for writs, all raise issues concerning the application of *State v. Curtis, supra*, and the effect of its holding on other statutory provisions relative to diminution of sentence for good behavior. Three distinct problems are presented: (1) a pure *Curtis* issue, i. e. denial of the opportunity to earn good time diminution under La.R.S. 15:571.3(B) by the operation of laws passed after the date the offense was committed; (2) the effect of *Curtis* on the operation of La.R.S. 15:571.4 relative to computation of good time to be applied toward diminution of sentence, as amended by Acts 1977, No. 665, § 1; and (3) the effect of *Curtis* on the application of various provisions relative to forfeiture of good time by parole violators, including particularly La. R.S. 15:571.4.

Eligibility for Diminution of Sentence for Good Behavior

La.R.S. 15:571.3(B) provides as follows:

> Every inmate in the custody of the Department of Corrections who has been convicted of a felony and sentenced to imprisonment for a stated number of years or months may earn a diminution of sentence by good behavior and performance of work or self improvement activities or both to be known as "good time." Those inmates serving life sentences will be credited with good time earned which will be applied toward diminution of their sentences at such time as the life sentences might commuted to a specific number of years. The director of corrections shall establish procedures for awarding and recording of good time and shall determine when good time has been earned toward diminution of sentence. The amount of diminution of sentence allowed shall be otherwise provided by law.

This general provision authorizing the awarding of good time for *all* inmates in the custody of the Department of Corrections was last amended in 1972. Acts 1972, No. 739, § 1.[1]

In 1975, the legislature added a section C to La.R.S. 15:571.3 which stated as follows:

> No inmate in the custody of the Louisiana Department of Corrections who has been convicted one or more times under the laws of this state of first or second degree murder, manslaughter, aggravated battery; aggravated, forcible or simple rape; aggravated kidnapping; aggravated or simple burglary; armed or simple robbery; any violation of R.S. 14:67 which is a felony; any violation of R.S. 14:95, R.S. 14:95.1, or R.S. 40:1751 et seq. which is a felony; any violation of the Louisiana Uniform Controlled Dangerous Substances Law which is a felony; or any felony defined as an attempt to commit one of the aforementioned crimes and who has been sentenced as an habitual offender under the Habitual Offender Law as set forth in R.S. 15:529.1 shall be entitled to diminution of sentence for good behavior under this Part, *if so ordered by the sentencing court.*

Acts 1975, No. 727, § 1 (emphasis added). The provisions of the Act specifically stated that it applied "only to persons convicted under the Habitual Offender Law after September 15, 1975." Acts 1975, No. 727, § 3.

This added provision was amended in 1977 to provide as follows:

> (1) *No inmate* in the custody of the Louisiana Department of Corrections who has been convicted one or more times under the laws of this state of first or second degree murder; manslaughter; aggravated battery; aggravated, forcible or simple rape; aggravated kidnapping; aggravated or simple burglary; armed or simple robbery; any violation of R.S. 14:67 which is a felony; any violation of R.S. 14:95, R.S. 14:95.1, or R.S. 40:1751, et seq. which is a felony; any violation of the Louisiana Uniform Controlled Dangerous Substances Law which is a felony; or any felony defined as an attempt to commit one of the aforementioned crimes and *who has been sentenced as a habitual offender under the Habitual Offender Law* as set forth in R.S. 15:529.1 *prior to or on September 9, 1977, shall be entitled to diminution of sentence for good behavior under this Part, if so ordered by the sentencing court.*
>
> (2) *No inmate* in the custody of the Louisiana Department of Corrections who has been convicted one or more times under the laws of this state of first or second degree murder; manslaughter; aggravated battery; aggravated, forcible or simple rape; aggravated kidnapping; aggravated or simple burglary; armed or simple robbery; any violation of R.S. 14:67 which is a felony; any violation of R.S. 14:95, R.S. 14:95.1, or R.S. 40:1751, et seq. which is a felony; any violation of the Louisiana Uniform Controlled Dangerous Substances Law which is a felony; or any felony defined as an attempt to commit one of the aforementioned crimes and *who has been sentenced as a habitual offender under the Habitual Offender Law* as set forth in R.S. 15:529.1 *after September 9, 1977 shall be entitled to a diminution of sentence for good behavior under this Part.*

Acts 1977, No. 633, § 1 (emphasis added).

[1–3] Under *Curtis*, the controlling date for the application of these statutory provisions can no longer be the date on which the defendant is sentenced as a habitual offender. Rather, reference must be made to the date the offense was committed in order to determine the constitutionally applicable provision relative to good time eligibility. An examination of the various legislative acts and their *specified* effective dates,[2] in

1. The 1972 amendment clarified eligibility for good time of inmates sentenced to life imprisonment and added the requirement of "procedures for awarding and recording of good time."

2. La.Const. Art. 3, § 19 (1974) provides as follows:

> Section 19. All laws shall take effect on the sixtieth day after final adjournment of the session in which they were enacted, and shall be published prior thereto in the official journal of the state as provided by law. However, any bill may specify an earlier or later effective date.

The general effective date for the 1975 regular session was September 12, 1975, while for the 1977 regular session it was September 9, 1977. Acts 1975, No. 727 [illegible]

after September 9, 1977. While the controlling event established in the act was the sentencing of the defendant as a habitual offender rather than the commission of the offense, these dates rather than the general effective dates are employed to trigger application of the statutes under *Curtis*. This procedure is used for purposes of clarity and ease of application, as well as to comply with the constitutional language that "any bill may specify an earlier or later effective date." It should be noted that the difference between the [illegible]

light of *Curtis*, establishes the following: (1) any person convicted of a felony *committed* on or prior to September 15, 1975, is eligible for diminution of sentence for good behavior regardless of the nature of his offense(s) and whether or not he has been adjudged a habitual offender; (2) any person who has *committed* a felony between September 16, 1975 and September 9, 1977 inclusive, has been convicted one or more times of one of the offenses enumerated in La.R.S. 15:571.3(C), and is sentenced as a habitual offender, is eligible for good time unless specifically denied such eligibility upon order of the sentencing court; and (3) any person who has *committed* a felony on September 10, 1977 or thereafter, has been convicted one or more times of one of the offenses enumerated in La.R.S. 15:571.3(C), and is sentenced as a habitual offender is automatically denied eligibility for diminution of sentence for good behavior.

Computation of Good Time

La.R.S. 15:571.4 sets forth procedures for the computation of good time to be applied toward diminution of sentence. In 1972, the section relative to inmates in the custody of the Department of Corrections was amended to provide, with respect to the basis for computation, that "[g]ood time for all sentences will be computed on the basis of *25 days per month* for time actually served, which amount shall be applied toward diminution of sentence." La.R.S. 15:571.4(B), as amended by Acts 1972, No. 739, § 1 (emphasis added). Section 2 of the same Act stated with respect to applicability as follows:

> The provisions of this Act shall be applicable to all inmates presently in the custody of the Department of Corrections . . . provided that those inmates presently serving longer sentences will not be credited with less good time than they might already have earned under the provisions of Act 426 of 1964.
>
> The provisions of this Act shall also be applicable to all inmates hereafter sentenced for any term longer than one month as imposed or to which sentence is computed.

Acts 1972, No. 739, § 2. La.R.S. 15:571.4(B) was again amended by Acts 1974, No. 200, § 1, but only relative to the effect of parole revocation on forfeiture of good time. *See* discussion *infra*.

In 1977, however, the legislature added a new section to La.R.S. 15:571.4 which provides that for inmates convicted subsequent to September 9, 1977 "[g]ood time for all sentences will be computed on the basis of *fifteen days per month* for time actually served, which amount shall be applied toward diminution of sentence." La.R.S. 15:571.4(C) as added by Acts 1977, No. 665, § 1 (emphasis added). The clear intent of this added provision is that the basis for computing good time for inmates *convicted* after September 9, 1977 is to be fifteen (15) days per month rather than the twenty-five (25) days per month basis applicable to those convicted on or prior to September 9, 1977. The issue presented is whether the application of this 1977 amendment to persons who *committed* offenses on or prior to September 9, 1977, but who were convicted subsequent to September 9, 1977 violates the ex post facto prohibitions of the United States and Louisiana constitutions as interpreted in *State v. Curtis, supra*.

That the statute has been changed to some inmate's disadvantage after the commission of the offense is clear. Prior to 1977, eligible inmates, on recommendations based on a thorough evaluation of their behavior, work performance and efforts toward self-improvement, could receive a credit of good time of approximately forty-five percent, i. e. "twenty-five days per month for time actually served." Following the amendment, this provision allowing for a maximum diminution of sentence of approximately forty-five percent would still apply to inmates convicted on or before September 9, 1977. However, under the amendment as written, eligible inmates convicted on September 10, 1977 or thereafter, can only receive a maximum diminution of sentence of approximately twenty-five percent, i. e. "fifteen days per month for time actually served." The pertinent inquiry is whether this change is the type of retroactive law prohibited by the ex post facto clauses.

[4] It has been stated that "any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or *which alters the situation of the accused to his disadvantage.*" *In re Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890), quoted in *State v. Curtis, supra* (emphasis added). Applying these principles, courts have held that the ex post facto clause prevents legislatures from retroactively increasing punishment for past criminal acts and consequently have struck down as unlawful increases in punishment retroactive changes in post conviction treatment of individuals. *See Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937); *In re Medley, supra; State v. Bullock*, 263 La. 946, 269 So.2d 824 (1972); *State ex rel. Woodward v. Board of Parole*, 155 La. 699, 99 So. 534 (1924). In *State v. Curtis, supra*, we found that the changes in La.R.S. 15:571.3 relative to eligibility for diminution of sentence for good behavior fell within this classification. We conclude that the change in La.R.S. 15:571.4 is similarly unconstitutional.

Under the rationale of *Curtis* and the cases relied upon therein, there is no analytical distinction between a change in eligibility for diminution of sentence for good behavior and a change in the basis for computing good time credits. While there is no vested right in either situation, both amendments are not simply "minor changes in the handling of prisoners" which should not automatically trigger application of the ex post facto prohibition, but rather *significantly* affect "release eligibility." *State v. Curtis, supra*.[3] Thus La.R.S. 15:571.4(C) may not operate against inmates who committed the offense for which they have been sentenced prior to the enactment and effective date of Acts 1977, No. 665, § 1. Rather the controlling date for application of the statutory provisions must be the date the offense was committed. Thus under the pertinent legislation: (1) any person confined to the custody of the Department of Corrections who *committed* the offense for which he has been sentenced on or prior to September 9, 1977, and who would otherwise be eligible for diminution of sentence for good behavior, *see* discussion of statutory eligibility, *supra*, *must* be eligible for a maximum of twenty-five days good time credit per month;[4] (2) any person confined to the custody of the Department of Corrections who *committed* the offense for which he has been sentenced on September 10, 1977 or thereafter, and who is otherwise eligible for diminution of sentence for good behavior, is only eligible for a maximum of fifteen days good time credit per month.

Forfeiture of Good Time By Inmates Whose Parole Has Been Revoked

Prior to 1972, La.R.S. 15:571.4(B), the statutory provision authorizing diminution of sentence for good behavior for persons committed to the custody of the Department of Corrections, was silent as to the effect of parole revocation on previously earned good time. *See* Acts 1964, No. 426, § 2. However, in 1972, the statute was amended to provide that "[g]ood time which has been earned will not be forfeited except

3. The legislature itself impliedly acknowledged the true import of the change in the basis for computing good time by having the amendment providing for a maximum credit of fifteen days per month applicable only to those inmates convicted after September 9, 1977, leaving intact the provisions for a twenty-five day max-

4. At this point, because the issue is not presented by any of the cases before us, we have not considered whether there are any ex post facto problems relative to inmates who committed offenses before the effective date of Acts 1972, No. 739, § 1, the provision which sets forth compensation

that an inmate . . . who is returned to an institution due to revocation of parole will forfeit *all* good time earned on that portion of sentence served . . . prior to parole." Acts 1972, No. 739, § 1 (emphasis added). The Act further provided that it was applicable to all inmates then in custody or thereafter sentenced to the department of Corrections but did specifically state that "parole violators presently in custody will not forfeit good time earned on that portion of their sentence served prior to parole . . ." Acts 1972, No. 739, § 2. The effective date of the Act was July 26, 1972.

In 1974, however, La.R.S. 15:571.4(b) was again amended in this regard to provide that "[a]n offender who is returned to an institution due to revocation of parole will forfeit *all* good time earned on that portion of the sentence served prior to parole *up to a maximum of one hundred and eighty days.*" Acts 1974, No. 200, § 1 (emphasis added). The Act further stated that "[t]he provisions of this Act relative to the maximum good time forfeitable upon parole revocation shall be retroactive." Acts 1974, No. 200, § 2.[5] Thus by its terms La.R.S. 15:571.4(B), interpreted with its various amendments and their effective dates, presently provides that parole violators in custody as of July 26, 1972 were not subject to forfeiture of good time earned on that portion of their sentence served prior to parole, but that all other inmates then in custody or thereafter sentenced to the Department of Corrections, regardless of the date of the commission of their offense or of their parole, would forfeit *all* good time earned on that portion of their sentence served prior to parole *up to* a maximum of 180 days when their parole is revoked and they are returned to the Department of Corrections institution.

It has been argued, however, that these provisions on forfeiture of good time upon revocation of parole are in conflict with general statutory provisions on parole revocation and that the latter provisions should control. In 1952, the legislature revised this state's statutes and at that time provided with respect to parole revocation as follows:

> If it is determined that the parolee has violated his parole . . . the Board shall revoke the said parole and the said parolee may be required to serve out the whole term for which he was sentenced, *subject* to the deduction of the time he had served prior to his parole and *to any diminution of sentence for good behavior he shall have earned or may thereafter earn.*

Acts 1952, No. 162, § 8 (emphasis added). Although the statute was amended in 1956, the language with respect to diminution of sentence for good behavior remained unchanged. Acts 1956, No. 66, § 1. In 1968, La.R.S. 15:574.9(E), the above mentioned provision, was amended to provide as follows:

> When the parole of a parolee has been revoked by the board for the violation of the conditions of parole, the parolee shall be returned to the institution from which he was paroled to serve the remainder of his sentence as of the date of his release or parole, *subject to* consideration by the board of any commutation of the sentence, the time he served prior to his parole, and *any diminution of sentence earned for good behavior while in the institution.*

Acts 1968, No. 191, § 1 (emphasis added).[6] The effective date of this Act was July 31, 1968. The legislature again amended the

5. The language relative to maximum good time forfeitable was carried over when La.R.S. 15:571.4 was amended in 1977 to change the basis for computation of good time from a maximum of twenty-five days per month to a maximum of fifteen days per month. Acts 1977, No. 685, § 1. *See* discussion of computa-

6. It is noted that while La.R.S. 15:574.9(E) refers to revocation of parole for a "condition" violation La.R.S. 15:574.10 provides that when parole is revoked for conviction of a felony, "[t]he term for which the defendant shall be imprisoned as a parole violator shall be the same as that provided in cases of revocation

statute in 1974, but the language with respect to diminution of sentence for good behavior was not altered. Acts 1974, No. 203, § 1.

[5, 6] Rules of statutory construction provide that where two statutes deal with the same subject matter, they should be harmonized if possible, but that if there is a conflict the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Esteve v. Allstate Ins. Co.*, 351 So.2d 117 (La.1977); *State v. Maduell*, 326 So.2d 820 (La.1976); *Teachers' Retirement System v. Vial*, 317 So.2d 179 (La.1975). *See also* Sutherland, Statutory Construction, § 51.05 (4th ed. 1974). Applying this principle we conclude that the controlling provision with respect to forfeiture of good time in the present context is La.R.S. 15:571.4. That statute deals specifically with procedures for earning, computing and forfeiting good time, while La.R.S. 15:574.9 deals generally with parole revocation, simply referring to diminution of sentences for good behavior in one subsection. Thus, the language in La.R.S. 15:574.9 as amended by Acts 1968, No. 191, § 1 and Acts 1974, No. 203, § 1 that a parolee is to serve the remainder of his sentence, following revocation, subject to "any diminution of sentence earned for good behavior while in the institution" must be read together with and is modified by the language in La.R.S. 15:571.4(B), as amended by Acts 1972, No. 739, § 1, Acts 1974, No. 200, § 1 and Acts 1977, No. 665, § 1, relative to forfeiture of good time upon a parole revocation.

[7, 8] Having determined that La.R.S. 15:571.4(B) prevails insofar as there is any conflict with La.R.S. 15:574.9, we must now determine whether the application of the 1972 provisions providing for forfeiture of good time for all inmates returned to an institution for parole violation on or after July 26, 1972, as amended retroactively in 1974 to provide for a maximum good time forfeitable, violates the ex post facto prohibitions in both the United States and Louisiana Constitutions. Art. I, § 10, U.S.Const.; Art. I, § 23, La.Const. of 1974. An ex post facto law is one which, inter alia, makes criminal an act which was innocent when done, or which aggravates a crime or makes it greater than it was when committed, or which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, or which alters the situation of a party to his disadvantage in an ex post facto law. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1978); *In re Medley, supra*; *State v. Curtis, supra*. As noted in *Curtis*, "a major principle underlying the ex post facto proscription is that laws which adversely affect individuals who have committed particular past acts failed to provide a fair warning of the extent to which that person can be punished" and that "retroactive legislation frustrates reliance upon existing law and does not serve an object of criminal law by providing guidance for conduct."

[9] Applying these basic principles to the statute providing for forfeiture of good time earned on that portion of a sentence served prior to parole when parole is subsequently revoked, we conclude that a violation of the ex post facto prohibitions occurs when the statute operates against a person who was *paroled prior to* July 26, 1972, the effective date of Acts of 1972, No. 739, § 2. However, it is not an ex post facto law to apply the provision to inmates paroled thereafter. In those cases, at the time of parole, inmates were or are put on notice by the wording of the statute that should they violate a condition such that parole is revoked and they are returned to the institution, they will as a consequence thereof forfeit good time credit. Thus the date of parole, rather than the date of the commission of the offense, triggers the application of the forfeiture provisions. *Cf. State v. Williams*, 358 So.2d 943 (La.1978); *State v. Guidry*, 169 La. 215, 124 So. 832 (1929); Lafave and Scott, Criminal Law § 12 (1969).

Thus in summary, all inmates paroled prior to July 26, 1972, may not be subjected to the forfeiture provisions, while all inmates paroled on July 26, 1972 or thereafter shall, upon their return to the institution following revocation of parole, forfeit all good time earned on that portion of the sentence served prior to parole up to a maximum of 180 days. La.R.S. 15:571.4(B)

Having resolved the various legal issues presented in these nine consolidated cases, we now turn to the specific allegations in each petition:

[10, 11] In *State ex rel. Bickman v. Dees*, No. 62,496; *State ex rel. Bell v. Dees*, No. 62,696; *State ex rel. Wade v. Dees*, No. 62,800; *State ex rel. Cornell v. Dees*, No. 62,802; and *State ex rel. Gifford v. Dees*, No. 62,918, each petitioner states that the offense for which he is incarcerated was committed prior to September 10, 1977, but after September 15, 1975. Assuming the correctness of the allegations, for the reasons assigned above, the classification of petitioners' sentences as without benefit of diminution of sentence for good behavior is improper at this time, and the cases are remanded to their respective district courts for resentencing under the discretionary authority vested with the trial judge by La. R.S. 15:571.3(C), as amended by Acts 1975, No. 727, § 1, the law in effect at the time of the commission of the offenses. In particular, the sentence shall state whether, in his discretion, the trial judge considers petitioner entitled to diminution of sentence for good behavior. It is additionally noted that since the offenses of each petitioner were committed prior to September 10, 1977, should petitioner be eligible for good time, the appropriate basis for computation is maximum of twenty-five (25) rather than fifteen (15) days per month. *See* La.R.S. 15:571.4(B) and discussion *supra*.

[12] In *State ex rel. Stevens v. Dees*, No. 62,717 and *State ex rel. Hinkley v. Phelps*, No. 63,072, each petitioner states that his offense(s) was (were) committed prior to September 10, 1977. Assuming the correctness of these allegations, for the reasons assigned above, the cases are remanded to the respective district courts with instructions to order the Department of Corrections to recompute petitioners' good time allowance at the rate of a maximum of twenty-five (25) days per month pursuant to La.R.S. 15:571.4(B) as in effect at the time of the commission of the offenses. With respect to Hinkley, it is specifically noted that because he is entitled to have diminution of sentence for good behavior computed on the basis of twenty-five (25) days per month, there is no merit to his argument that his guilty plea was involuntary due to misinformation given to him by the trial court relative to his good time release date.[7]

[13] In *State ex rel. Paulhus a/k/a O'Brien v. Custodian of Records, et al*, No. 62,969, and *State ex rel. Manuel v. Phelps*, No. 63,069, each petitioner complains of the forfeiture of good time he accumulated prior to parole when he was subsequently returned to the institution following parole revocation. Petitioner Paulhus a/k/a O'Brien alleges that he was released on parole on September 20, 1974, while petitioner Manuel asserts that his parole release date was March 13, 1973. Assuming the correctness of these allegations, for the reasons assigned above, the petitioners are not entitled to relief. Since they were both paroled after the July 26, 1972 effective date of La.R.S. 15:571.4(B) as amended by Acts 1972, No. 739, § 1 [subsequently modified by Acts 1974, No. 200 § 1], they were informed on the date of release that should they later have their parole revoked and be returned to the institution they would forfeit good time earned on that portion of the sentence served prior to parole.

For the reasons assigned, the writs in *State ex rel. Bickman v. Dees*, No. 62,496; *State ex rel. Bell v. Dees*, No. 62,696; *State ex rel. Stevens v. Dees*, No. 62,717; *State ex rel. Wade v. Dees*, No. 62,800; *State ex rel. Cornell v. Dees*, No. 62,802; *State ex rel. Gifford v. Dees*, No. 62,918; and *State ex rel. Hinkley v. Phelps*, No. 63,072 are granted and the cases are remanded to their respective district courts for further proceedings in accordance with law.

7. At the time defendant pleaded guilty, the trial complained that if he was indeed actually eligi-

For the reasons assigned, the writs in *State ex rel. Paulhus a/k/a O'Brien v. Custodian of Records, et al*, No. 62,969, and *State ex rel. Manuel v. Phelps*, No. 63,069, are denied.

SANDERS, C. J., and MARCUS, J., dissent, adhering to their dissent in *State v. Curtis*, 363 So.2d 1375 (La.1978).

SUMMERS, J., dissents.

1

STATE of Louisiana ex rel. Joseph BICKMAN

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

No. 62496.

Supreme Court of Louisiana.

Dec. 21, 1978.

In re: Joseph Bickman, applying for writ of certiorari (Parish of Orleans).

Writ granted. See Per Curiam 367 So.2d 283 (La.1978).

SANDERS, C. J., and MARCUS, J., dissent adhering to their dissent in *State v. Curtis*, 363 So.2d 1375 (La.1978).

SUMMERS, J., dissents.

2

STATE of Louisiana ex rel. Kent BELL

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

No. 62696.

Supreme Court of Louisiana.

Dec. 21, 1978.

In re: Kent Bell, applying for writ of certiorari (Parish of Orleans).

Granted. See Per Curiam. 367 So.2d 283 (La.1978).

SANDERS, C. J., and MARCUS, J., dissent adhering to their dissent in *State v. Curtis*, 363 So.2d 1375 (La.1978).

SUMMERS, J., dissents.

3

STATE of Louisiana ex rel. Ray STEVENS

v.

Hayden J. DEES, Warden, Dixon Correctional Institute.

No. 62717.

Supreme Court of Louisiana.

Dec. 21, 1978.

In re: Ray Stevens, applying for writ of certiorari (Parish of Calcasieu).

Granted. See Per Curiam. 367 So.2d 283 (La.1978).

SANDERS, C. J., and MARCUS, J., dissent adhering to their dissent in

RECEIVED
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In The State Supreme Court
Of Florida

William P. Basser, Petitioner,

vs

Case No. 57,021

Robert Graham, Governor, Respondent

In The Matter Of: Petition for Writ Of Injunction

Comes now William P. Basser, Petitioner above named and makes known to the Court that, on the 13th day of January, 1977 he was tried and convicted on jury trial in the County of Pinellas, State of Florida for an offense or offenses alleged to have been committed on the 3rd day of November, 1976, that he was sentenced to a total of seven years imprisonment and is presently confined in the Avon Park Correctional Institution at Avon Park, Florida; that the so called "New Gain Time Law" now being applied indiscriminately to all Prisoners of Florida. Petitioner is being subjected to punishment more onerous than the punishment contemplated by law at the time of both the commission of the alleged crimes and the time of prosecution and sentence, that such is a direct violation of Article One, paragraph 10, The Constitution of The United States that the said more onerous punishment is being inflicted by agents of Respondent Robert Graham, Governor; and is a direct result of Respondent's gross negligence in that he is the executive officer of the State of Florida is directly responsible for the unconstitutional acts of his agents is charged by both his oath of office and the law with protecting and preserving the Constitution of the United States.

Wherefore:

Petitioner prays that a permanent injunction issue out of the Court directed to and against Robert Graham, Governor and Respondent, ordering, Directing and Commanding that he immediately restore to Petitioner all "Statutory Gain Time" of nine hundred days plus all presently accumulated "Additional Gain Time" of ninety seven Days as of the 11th day of November, 1979, plus forty three days of "Additional Gain Time" awarded in the future be based upon the Tenative Expiration Date arrived at by proper computation of Petitioner's sentence under the laws in effect at the time of the offense.

And further:

That Respondent and/or his agents be permanently restrained from any acts of retaliation for this present filing of Petition for Writ of Injunction, and that Respondent and/or his agents be permanently restrained from any further

unconstitutional act in relation to the sentences now being served by Petitioner.

Respectfully Submitted

William P. Besser

CERTIFICATE IN PROOF OF SERVICE

I did, on this 22nd day of May, 1979, place a copy of the foregoing Petition for Writ of Injunction in the United States Mail, directed to Jim Smith, Attorney General, Counsel for Respondent, State Capitol, Tallahassee, Florida.

In the State Supreme Court of Florida

William P. Besser, Petitioner

vs

Case No. 57,021

Robert Graham, Governor, Respondent

MEMORANDUM

During the year 1978 Louie L. Wainwright went to the Florida Legislature and had the Florida Department of Corrections exempted from the Administrative Procedures Act as it relates to prisoner complaints; even if this were not so any attempt under the peculiar facts of the issue here to invoke any administrative remedy would be an exercise in futility.

The issue presented involves a violation of the Constitution of the United States, specifically Article 1 as it relates to Ex Post Facto Laws, or application of Laws and is a matter which invokes the jurisdiction of the State Supreme Court as the court of first instance under an Original Action

---

Petitioner was arrested in Pinellas County, Florida the 3rd day of November, 1976 and charged with Attempted Burglary and Possession of Burglary Tools. An Information was filed the 24th day of November, 1976 and trial was had to a jury the 13th day of January, 1977.

Petitioner was convicted as to both counts and sentenced to a total of seven (7) years imprisonment.

Subsequently, he was taken to Lake Butler Reception Center at Lake Butler, Florida, where he was given a copy of the Rules (Fla Dept of Corrections Rules for Inmates). That copy carried a chart which showed Petitioner had been given nine hundred days "good time" under the laws of Florida then in effect.

According to the Florida Statutes the only way to change that 900 days was to subtract because of disciplinary action or add according to "additional earned good time."

July 1st, 1978 a new law was passed and became effective changing the previous statutory allowance of "gain time."

That law, effective July 1st, 1978, has now been made effective as against Petitioner in a manner clearly repugnant to Article 1 paragraph 9 Constitution of the United States.

While the retroactivity of that law definitely runs counter to Article 1 paragraph 10 Florida Constitution as well and directly contravenes Article 3 paragraph 11 Florida Constitution, Petitioner recognizes that the Florida Depart-

ment of Corrections is contemptuous of all Constitutions and all laws (see Costello v Wainwright 95 S.Ct 1191) and that even the legislature and courts refuse to comply with Constitutions and laws (Gerstein v Pugh 95 S.Ct 854) We must add to that the plain fact that where laws are enacted, bureaus are entrusted with formulating rules of policy; then the State must abide by its own Rules. The Gain Time Policy prior to July 1, 1978 is reflected in the Rules (Department of Corrections) in effect prior to that time:

> (A. Statutory Gain Time: Statutory gain time is computed at the rate of (5) days per month for the first two years, ten (10) days per month for second two (consecutive) years, and fifteen (15) days per month for the fifth year (and all succeeding years served consecutively) of incarceration. The entire amount of statutory gain time is computed during your processing at the Reception and Medical Center and is reflected in the tenative expiration date computed on your sentence. Awarding of statutory gain time anticipates a satisfactory institutional record during your stay with the Department of Offender Rehabilitation. The following statutory gain time chart will aid you in computation of your sentence (see page 4).

See: Exhibit A - Attached.

On the 16th day of November, 1978 Petitioner's date of release (Including "additional earned good time) was fixed at February 7, 1981 under the law of that date. See: Exhibit B Attached.

On the 16th day of May, 1979 Classification awarded Petitioner 43 days - "additional earned good time" which, under the law and Rules in effect at the time of his sentence would have changed his expiration date to approximately the 26th day of December, 1980.

On the 16th day of May, 1979, Petitioner received a new release date fixed at October 28th, 1982.

The question before the Court is quite simple:

Since Petitioner was sentenced under the situation existing as of the 13th day of January, 1976 when the penalty contemplated by law (Fla. Stat. 944.27) was fixed at 1699 days minus any "additional earned gain time": - Can any "new gain time" law (Fla. Stat 944.275) be made effective against Petitioner without being in contravention to the Constitution of The United States, Article 1 P. 9 where that later statute added 629 days to the original penalty contemplated by law? See: EXHIBIT - B.

The holding in law as reflected by the Supreme Court of The United States:

2. Constitutional Law - Key 203

   Constitution forbids application of any new punitive measure to crime already consummated to detriment or material disadvantage of wrongdoer, and hence increase in actual penalty is ex post facto, regardless of length of sentence actually imposed.

Lindsey et al, v State of Washington, 301 U.S. 397, 57 S.Ct 797 and the Supreme Court stated:

> "...But the expost factor clause looks to the standard of punishment prescribed by a statute, rather then the sentence actually imposed..." Kring v Missouri, supra, 107 U.S. 221,228,229, 2 S. Ct 443, 27 L. Ed. 506; In re medley 134 U.S. 160, 171, 10 S. Ct. 384, 33 L. Ed 835; Thompson V Utah, 170 U. S. 343, 351, 18 S. Ct. 620, 42 L. Ed 1061. It is for this reason that an increase in the possible penalty is ex post factor, Calder v Bull, 3 Dall, 386, 390, 1 L. Ed. 648; Cummings v Missouri, Supra, 4 wall. 277, 368, 18 L. Ed. 356; Mallory v South Carolina, 237 U.S. 180, 184, 35 S. Ct. 507, 59 L. Ed. 905, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier. State v Callahan, 109 La 946, 33 La. 931; State vSmith 56 Or. 21, 107 P. 980.

It is thus self-evident that since Petitionar was convicted and sentenced the 13th day of January, 1977 for the commission of crime the 3rd day of November, 1976. See EXHIBIT C (Judgment and Sentence), that he must be punished according to the lesser punishment contemplated by the then existing gain time law and that any application of any law which changes his punishment of 1635 days less "additional earned gain time" to a penalty involving more than 600 added days is illegal.

Respondent may not argue that the "New gain time" law permits a prisoner to earn more "good time" even up to day for day for such, while probably the intent of the Legislature, would be totally false.

The Legislature enacted 944.275, in all probability, for the purpose of reducing Florida's prison population. Under the restrictions laid down by Respondent's executive branch of government, specifically by his agent Louie L. Wainwright, that law will definitely increase the present seriously over-crowded population of Florida's ponderous prison system, which is in reality Big Business, on a par with tourism, with a budget of ($159,000,000) one hundred and fifty nine million dollars which Secretary Wainwright would love to double.

Let us examine the facts:

It is shown by this case that Petitioner has lost 629 days through the ex post facto application of the newly enacted law. His original date of expiration is shown as February 7, 1981; - the new date shown (exhibit A) shows October 28th, 1982.

Under the system contemplated when Petitioner entered the Florida Prison System he would have received 36 days additional gain time during the month of May, 1979; 36 days additional gain time during the month of November, 1979; - 36 days additional gain time during the month of May, 1980 which total of 108 days would have, and now must, move Petitioner's date of actual release back to about the 22nd day of October, 1980.

Under the 'new gain time' law and under the existing circumstances,

far from the day for day which is the theory, in actual application Petitioner will receive precisely eight (8) days per month additional or earned "good time" and six (6) days per month statutory gain time up to (and including) the 3rd day of November, 1980; following that date he will receive nine (9) days per month statutory "gain time" and eight (8) days per month "additional gain time" and his date of actual release would be approximately the 22nd day of October, 1981; or some (8½) eight and one half months longer than the punishment contemplated by law at the time of the offense, judgment and sentence as shown by Exhibits A, B and C.

Such is an ex post facto law and the Constitution and laws of The United States prohibits ex post facto laws.

Petitioner holds that any law passed after the 3rd day of November, 1976 which increases the punishment can not operate against him and shows:

> A Law may be expost facto in some respects and not so in others - may be ex post facto as to one and perfectly justifiable as to another, and in the former case, the courts do not declare the law void, but that it cannot operate against that party. U.S. v Hall, cc. PA 1809, 2 Wash 366, 26 Fed Cas No 15,285, affirmed 10 U.S. 171, 6 Cranch 171, 3 L. Ed. 189.

That Florida's statute which became effective the 1st day of July, 1978 cannot be applied to Petitioner is obvious from the following:

> An ex post facto law is one which in its operation makes that criminal or penal which was not so at the time the action was performed, or which increased the punishment; or, in short, which in relation to the offense or its consequences, alters the situation of a party to his disadvantage. U.S. v Hall, CC PA 1809, 2 Wash 366, 26 Fed. Cas No. 15, 285, affirmed 10 U.S. 171, 6 Cranch 171, 3 L. Ed. 189; Thompson v Utah, 1898, 18 S Ct. 620, 170 U.S. 343, 42 L. Ed. 1061; People v WARD 1958 328 P 2d 777, 50 C 2d 702, 79 S. Ct. 750, 359 U. S. 945, 3 L. Ed. 2d 678, 76 A.L.R. 2d 911; State v Ferrie, (1962), 144 So 2d 380, 243 La 416, Bauer v Atcheson, D.C. D.C. (1952) 106 F Supp. 445

Petitioner moves the Injunction issue, all other relief be granted and that such Orders be made permanent.

Respectfully submitted,

William P. Besser

PROOF OF SERVICE

I, William P. Besser, did place a copy of the foregoing Memorandum in the United States mail directed to Jim Smith, Atty. Gen of Florida, who is counsel for Respondent, THIS 23RD DAY OF MAY, 1974.

William P. Besser

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JUNE 22, 1979

WILLIAM P. BESSER,	**	
Petitioner,	**	ORDER TO SHOW CAUSE
vs.	**	
ROBERT GRAHAM, Governor,	**	CASE NO. 57,021
Respondent.	**	

WHEREAS, the Court has determined that the Petition demonstrates a preliminary basis for relief, this is to command ROBERT GRAHAM, Governor, to show cause on or before July 9, 1979, why the Petition should not be granted. Petitioner may serve his response on or before July 19, 1979.

/s/ Sid J. White
Clerk of the Supreme Court of Florida.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. Jim Smith
Mr. William P. Besser

IN THE SUPREME COURT OF FLORIDA

WILLIAM P. BESSER,

Petitioner,

-v-

CASE NO. 57,021

ROBERT GRAHAM,
Governor,

Respondent.

RESPONSE

COMES now respondent, by and through his undersigned attorneys, and makes this response to the order to show cause heretofore entered in the captioned proceeding on June 22, 1979 and says:

I.

Respondent says petitioner is being held in lawful custody pursuant to a commitment issued January 18, 1977, copy of which is attached as Exhibit 1.

II.

Petitioner challenges the manner in which is gain time has been computed. Therefore, respondent has had petitioner's time (including gain time accrued under the new statute, Section 944.275) computed showing a tentative expiration date of December 9, 1981. This affidavit showing the computation of petitioner's time is attached as Exhibit 2. The new gain time statute, Section 944.275, although effective July 1, 1978, was not implemented until January 1, 1979 by the Department of Corrections. This means that petitioner's gain time accrued pursuant to the provisions of Section 944.27 up until January 1, 1979, although the statute was repealed July 1, 1978.

III.

Petitioner's attack on the validity of the new gain time statute, Section 944.275, is without merit. Please

see A.G.O. 078-96, copy of which is attached as Exhibit 3. As stated in the Attorney General's opinion, court's have repeatedly held that the allowing of gain time is an act of grace and that a prisoner has no right to receive gain time absent the legislature's exercise of its grace or discretion. For additional authority supporting this position, please see Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957); People ex rel. Kleinger v. Wilson, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Kastel v. Fish, 36 F.Supp. 700 (D.C.Md. 1931); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Comerford v. Massachusetts, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; Lembersky v. Parole Board of Dept. of Correction, 124 N.E.2d 521 (Mass. 1955); People ex rel. Colletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972), citing Dear v. Mayo, 14 So.2d 267 (Fla. 1943), with approval.

IV.

Each and every allegation challenging the legality of petitioner's incarceration not heretofore specifically answered or denied is hereby severally denied and the contrary allegation lodged.

CONCLUSION

The petition for writ of injunction, habeas corpus or mandamus should be denied.

JIM SMITH
Attorney General

By: Wallace E. Allbritton
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Florida 32301

IN THE STATE SUPREME COURT OF FLORIDA

WILLIAM P. BESSER, PETITIONER,

-VS-

CASE NO. 57,021

ROBERT GRAHAM, GOVERNOR, RESPONDENT

PETITIONER'S REPLY TO RESPONSE OF RESPONDENT

STATEMENT OF FACTS

On the 13th day of January, 1977, Petitioner was sentenced to a total of seven (7) years imprisonment following jury trial in Pinellas County, Florida, for an offense allegedly committed the 3rd day of November, 1976; - B.J. Driver, Judge.

On the 8th day of March, 1977, Petitioner entered Lake Butler Reception Center and was, that day, awarded nine hundred (900) days "Statutory Gain Time" under Florida Statute 944.27 with the added condition that such "Statutory Gain Time" was dependant upon "good conduct while in prison".

An extra condition was added that Petitioner could earn "additional earned good time" by work and conduct.

Petitioner has the required "good record" both as to his conduct and his work.

On the 1st day of July, 1978, Florida Statute 944.27 was repealed and a new Statute, 944.275, was implemented.

The new gain time Statute caused Petitioner's date of expiration to change by taking from Petitioner, through Executive (Administration) action, a substantial amount of the gain time awarded at the time of sentence.

On the 16th day of May, 1979, Petitioner was notified that his expiration date had been changed from February 7, 1981, to October 29, 1982; a difference of 20 months and 3 weeks. See: (EXHIBIT A)

Petitioner prepared and mailed a Petition for Writ of Injunction the 23rd day of May, 1979, which was processed and filed by the Clerk of this Court.

About the 22nd day of June, 1979, an Order to Show Cause why the Writ should not issue was made by this Court.

On the 9th day of July, 1979, Petitioner received that Response and found that it was primarily based upon Opinion of Attorney General 78-96. (EXHIBIT B) That Opinion is here shown to rest entirely upon false and misleading premises.

Other portions of the cited Response are here cited as being not in point

and, legally, inapplicable to the issues raised by the Petitioner.

I

The entire matter was caused by an obviously erroneous Opinion by Attorney General Robert Shevin, Op. Aty. Gen. 78-96. (EXHIBIT B)

That Opinion cites, as its basis, four cases which must be examined:

1. Rankin v Wainwright, 351 F. Supp. 1306 (N. D. Fla 1972)

Rankin has absolutely no bearing upon the issue here. It deals only with the taking of gain time for escape as permitted by Florida Statute 944.28. That case does prove that Petitioner's gain time was unlawfully taken since the Court's Order there provides:

(1) Respondent Wainwright must either hold an administrative hearing or release Rankin within 30 days; and,

(2) Due Process (limited), to include:
(A) Written Notice
(B) Disclosure of Evidence against Rankin
(C) Opportunity to be heard and present witnesses
(D) Right to confront witnesses
(E) Neutral and detached hearing body
(F) Unqualified access to legal materials in the prison
(G) Written statement by fact finders returned to Court
(H) Court retained jurisdiction

Rankin spelled out in detail that good time may not be taken except for violations; and then only under due process. In the instant case Petitioner did not escape.

2. Dear v Mayo, 14 So 2d 267 (Fla 1943)

Dear is even further from point at issue than Rankin. Dear involves a parole violation and, true enough, Court held that Dear's gain time was lawfully taken under Fla. Stat. 944.21. Petitioner did not violate parole.

3. Mayo v Lukers, 53 So 2d 916 (Fla 1951)

Deals with forfeiture of gain time for parole violation and establishes that gain time may only be taken for acts of the prisoner. Petitioner did not violate parole.

4. Kimmons v Wainwright, 328 So 2d 230 (1976A Fla 1976)

Again we have a case dealing with forfeiture of gain time under Fla. Stat. 944.28 for parole violation and the instant case does not present the issue of gain time lost for parole violation; - and, Petitioner did not violate parole.

While an Attorney General's Opinion is generally persuasive, where the Opinion is so faulty as to be completely without merit in that such Opinion

attempts to read into cases facts that are not only not contained in the cited cases; - but as in this case, the Opinion cites law which is in direct contravention to the Opinion stated; - then such an Opinion becomes a mockery and a farce and should be given absolutely no weight.

Solely for the Court's convenience copies of the four cases cited in Op. Atty. Gen. 78-96 are hereto attached.

II

Respondent cites several cases in support of his position and an examination of those cases finds them either distinguishable on the facts, not in point, or have been mooted by the case of Morrissey v Brewer, 408 US 471, 92 S Ct 2593, 41 L Ed 2d 484 (1972).

The first case so cited, Graham v Thompson, 246 F 2d 805 (10th Cir 1957), is distinguishable on the facts in that it clearly involves Utah where the power to grant or deny "good time" was an administrative function since the Utah Constitution provided the Board of Pardons with authority over gain time and the statute only fixed guide lines which the Board was to observe; so the granting of good time was not mandatory as under Fla. Stat. 944.27, but discretionary.

Respondent cites People ex rel Kleinger v Wilson, 5 N.Y. S 2d 934 (S. Ct. App. Div. 3 1938) and Hiatt v Campagna, 178 F 2d 42 (5th Cir 1949). These cases are not only not in point since they both involve parole; both were pre-Morrissey v Brewer; and, both were mooted by Morrissey v Brewer.

Respondent then cites Gilstrap v Clemmer, 264 F 8d4 (4th Cir. 1959) which case has no bearing here since Gilstrap involved loss of gain time triggered by a parole revocation where the prisoner was charged with knowing that he faced more time if he violated his parole, and is not only out of point but has no bearing on the issue presented by the instant case.

Respondent cites Estabrooks v King, 116 F 2d 607 (8th Cir. 1941) where the issue concerned gain time lost through a transfer to a mental hospital. Such loss would have occurred in Florida also and has absolutely no bearing on the issue here.

He then goes to People ex rel Colletti v Pate, 201 N. E 2d 390 (Ill. 1964) which resolves an administrative procedure as to "good time" but has no relation to the issue of Statute change here presented.

His cite of Shattuck v Grider (Okla. Crim App 1972) again addresses the issue of gain time forfeiture for parole violation, and states that: "citing

Deer v Mayo, 14 So 2d 267 (Fla 1943) with approval" but neglects to inform the Court that Deer v Mayo goes only to the single issue of loss of gain time for parole violation.

In Comerford v Mass, 233 F 2d 294 (1st Cir 1956) State gain time had been increased and prisoner wanted it ruled retroactive in an attempt to secure the additional gain time prior to the enactment of the law; Comerford is diametrically opposed to the instant case.

Nowhere in either Respondent's Response or Opinion Attorney General 78-96 can be found any legal reason for even making such a Response. The cited Opinion of Attorney General does not go to the ex post facto operation of Florida Statute 944.27 complained of but merely shows that, for specific violations, gain time may be lost.

Respondent's citations of cases go likewise to the fact that, for violations, good time may be taken; but such is not the issue here.

All that needs be decided is whether a fixed date for expiration of sentence may be changed to the material disadvantage of Petitioner, or whether such change would constitue an ex post facto application of the changed Statute. We are concerned specifically with Florida Statute 944.27 in full force and effect at the time Petitioner was sentenced and Florida Statute 944.275 which altered Petitioner's situation to make his punishment more onerous.

III

Under Florida Statute 944.275 (New Gain Time Law) a prisoner is said to have opportunity to earn day for day additional earned good time.

Such is an absolutely false assumption. The facts are plain. Petitioner shows (EXHIBIT C) that he works 8 hours a day, seven days per week and received 6 days per month additional earned gain time.

The vast majority of prisoners receive 4 days per month additional earned gain time (EXHIBIT D).

In fact, the Department of Corrections has made absolutely certain that prisoners will not even receive the amount of gain time they should have under the legislative intent. This is shown by a letter to all Superintendents and others from Respondent's agent Ron Jones (EXHIBIT E) which clearly demonstrates that the Respondent's plan is to hold additional earned gain time to a minimum.

For that reason, Petitioner submits that under the Statute in effect at the time of his sentence he would have received 10 days Statutory time for each

month of the current 2 years (1979-1980) plus 6 days extra gain time for work - conduct record for a total of 16 days per month; but under the New Gain Time Law here at issue, he would receive only 6 days per month plus 8 days additional gain time for a total of 14 days per month.

Court may take judicial notice that additional gain time is not here at issue, only Statutory gain time is involved.

IV

The Response in the instant case is apparently ill thought out and should be viewed as being immaterial, irrelevant, and probably frivolous in that it makes absolutely no attempt to address the single issue before the Court.

The issue was clearly stated on the face of the Petition here and was properly presented in the Memorandum submitted.

One thing appeared to Petitioner to be strange. Response did not cite this Court's Case, Wilensky v Fields, 267 So 2d 1 (Fla 1972) so Petitioner examined that particular case and discovered that while the facts dealt with a change in the criminal penalties for Usury and are not here relevant; the controlling legal principle in Florida is:

> "Article I, Section 10, Florida Constitution, 1968, provides that no ex post facto law shall be passed. An ex post facto law is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increased the punishment, or, in short which in relation to the offense or its consequences alters the situation of a party to his disadvantage." Higgenbottom v State, (Fla. 1924) 88 Fla 26, 101 So 232. Citing Wilensky at 5.

As Petitioner has demonstrated, Florida Statute 944.275 alters Petitioner's situation to his disadvantage since it deprives him of his vested right to release from imprisonment on a date certain pursuant to Florida Statute 944.27.

Appended hereto for the Court's consideration is the pertinent text from Geraghty v United States Parole Commission, 579 F 2d 238 at 241 to 257 (3rd Cir. 1978), "Outlines of Ex Post Facto Prohibition", with particular attention directed to footnote 136:

> "This Court held in U.S. ex rel Forino v Garfinkel, 168 F Ed 687 (1948) that repeal of a provision removing civil disabilities upon completion of a sentence was not an ex post facto law. This holding has been substantially undercut by the Supreme Court's affirmation of Scafati. This holding has also been rendered inapplicable to this case by the recognition of parole and good time as protected liberty interests. Morrisey v Brewer, 408 U.S. 471 92 S. Ct. 2593, 33 L. Ed 2d 484 (1972) and Wolff v McDonald, 418 U.S. 539, 94 S. Ct 2963, 41 L. Ed (1974)
>
> We likewise decline to follow, and question the continued viability of Singleton v Shafer, 313 F. Supp. 1024 (E.D. Pa 1970) (repeal of good time statute not ex post facto) and Graham v Thompson, 246 F 2d 805 (10th Circuit 1957) (repeal of good time statute not ex post facto, resting on interpretation of Utah Law)"

Thus, with one of the latest decisions by a Federal Court, depending upon decisions of the United States Supreme Court, striking down all of the arguments presented by the Response in the instant case, there can be no doubt that Florida Statute 944.275 is ex post facto as it applies to Petitioner.

V

Statutory gain time for good behavior was designed to benefit both society and the prisoner. Society benefits from the development of proper behavioral patterns demonstrating respect for rules and the law; the prisoner benefits because the allowances allow the prisoner to serve a specific portion of his sentence, as defined by law, outside the confines of the prison.

There is no requirement that a state must legislate gain time provisions; thus, an accused may not complain if none exist; However, once the legislature enacts such statutes and it is settled that an accused shall have his actual incarceration decreased pursuant to said statutes the accused has a vested interest and right to have the statute remain in full force and effect unaltered by subsequent enactments which reduce such benefits.

In the absence of legislation there is no vested interest but once enacted it may become vested in that the terms and conditions are settled as is the method and procedures by which allowances may be lost or forfeited.

Simply stated, as applies to instant claim, the law of Florida provided that upon commission of an offense the accused may satisfy the requirements of the law, the actual sentence imposed, by serving a period of imprisonment with credit for statutory gain time; thus, the statutory gain time provisions in effect at the time of the commission were an inherent, essential, and inseperable part of the sentence guaranteeing that the actual imprisonment would be reduced for good behavior as specified by law. If "X" equals the sentence, "Y", the statutory gain time; and, "Z", the actual term of imprisonment, it reduces to: "X" = "Y" + "Z".

While normally a vested interest may accure, grow, and ripen, the system in effect at the time of Petitioner's processing into the Department of Corrections gave him an immediate vested right to the gain time guaranteed by Statute 944.27 since it was awarded to him in advance of serving the sentence, on the condition of good behavior while serving the sentence. This accords with the definition of vested rights:

> "Rights which have so completely and definitely accured to or settled in a person that they are not subject to be defeated

or cancelled by the act of any other private person, and which is right and equitable that the government should recognize and protect as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.....which cannot be interfered with by retrospective laws, are interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice." (Citations omitted) Black's Revised 4th (1968) at page 1735

Instant Petition reflects that, because of a law passed subsequent to the commission of the offense for which Petitioner is incarcerated, the lawful formula in effect pursuant to law has been altered and Respondent would now impose such new legislation upon Petitioner. In effect: "X" no longer equals "Y" + "Z"!!!!

The present application of the law (Florida Statute 944.275) is both retrospective in that it contemplates what is past and retroactive in that it creates for prisoners in Florida a new obligation to be fulfilled in order to secure their release from actual physical incarceration. See Black's page 1480.

Because the legislature created statutory gain time for good behavior; because that statutory provision (944.27) was in full force and effect at the time of the offense charged; and, because the Department of Corrections computed and awarded Petitioner 900 days good time when he was incarcerated, having the effect of putting Petitioner on notice that he would be released no later than a date certain, provided his behavior was good pursuant to statute, a vested right accrued to Petitioner mandating his release on that date certain. The application of 944.275 to Petitioner altered that date certain to the disadvantage of Petitioner and is, as to Petitioner, an ex post facto law.

CONCLUSION

Petitioner has demonstrated that Respondent, through his agent Ron Jones, has no intention of complying with even the rudimentary demands of fairness and justice. (EXHIBIT E)

He has shown, by exhibits submitted, that he has been materially disadvantaged by the application in an ex post facto manner of Florida Statute 944.275.

Respondent has shown only that gain time may be forfeited by violations of rules or laws.

The only test is whether or not Petitioner's situation was altered to his disadvantage and it would certainly appear that moving a pre-fixed date of expiration from the 7th day of February, 1981, to the 28th day of October, 1982,

would meet that test. Petitioner points out that the Affidavit of Louie L. Wainwright now fixing Petitioner's date of release at December 9th, 1981, was deliberately computed after Petition for Writ of Injunction was filed in a rather obvious effort to confuse the Court. That date is still ex post facto application of the New Gain Time Statute (944.275) in that it still adds to the date of release contemplated by law at the time of Petitioner's incarceration.

The Response should be evaluated for what it truly is; a collection of irrelevant statements and cases not in point:

and:

The Writ should issue.

Respectfully Submitted,

WILLIAM P. BESSER

PROOF OF SERVICE

On this_____day of_____, 1979, I did mail true copies of the foregoing Reply to Response to Mr. Robert Graham, Respondent, and Mr. Jim Smith, Attorney, General, Counsel for Respondent, at their respective addresses: State House, Tallahassee, Florida. .

WILLIAM P. BESSER

UNDER "OLD LAW"

AVON PARK CORRECTIONAL INSTITUTION 651
Avon Park, Florida

EXTRA GAIN TIME

INMATE'S NAME Besser, William NUMBER 058568

Extra gain time that was recommended by the Team has been approved by Central Office.
[illegible], 19[illegible]

Applied for 36 days, beginning [illegible], 19 72

and ending [illegible], 19 72

m 1319 Tentative Release Date 2-7, 19 81

UNDER "NEW LAW"

[illegible] Besser, William P [illegible] 058568 [illegible] BOX # 651

[illegible] release date (CRD) computed [illegible] law is 10 25 1985.

[illegible] of gain time or loss of [illegible] was 7-24-1978

/

EXHIBIT - B A

State of Florida
DEPARTMENT OF CORRECTIONS

Monthly Work Gain Time Award

INMATE HOUSE KEEPING NUMBER ✓ MONTH & YEAR JUNE 1974

JOB ASSIGNMENT HOUSE KEEPING
(List Actual Job Performed By Inmate)

JOB CLASSIFICATION ☒ Unskilled ☐ Semi-Skilled ☐ Skilled

JOB PERFORMANCE (Mark Appropriate Boxes)

	Unsatisfactory	Satisfactory	Above Satisfactory	Outstanding
QUALITY		X		
QUANTITY		X		
DILIGENCE		X		
	0 Points	1 Point	2 Points	3 Points

TOTAL POINTS: 0-2 = 00% 3-4 = 50% 5-7 = 75% 8-9 = 100%

HOURS WORKED (Show Actual Hours For Each Day) TOTAL HOURS MONTH _____

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
8	8	8	8	8	8	8	8	8	8	8	8	8	8	

WORK AREA

Total Hours Worked	÷ Hours Of One Day (8)	= Days Worked	× Performance Percentage	= Sub Total	× *Skill Level	= Work Gain Time Award
240	÷ 8	= 30	× 50%	= 15	× 50%	= 7½

★ Unskilled = 50% Semi-Skilled = 75% Skilled = 100%

COMMENTS This is one of the very few 7 days a week 8 hour jobs which gives 8 days per month

_____
(White Supervisor's Signature) (Date)

INSTRUCTIONS Work Gain Time Award Forms should be prepared in duplicate. The immediate supervisor is to determine on a daily basis the number of hours of actual work to be credited to the inmate. Enter the number of hours rounded off to the nearest hour into the appropriate date block. At the end of the month calculate the total number of hours worked and enter this figure in the space provided. The completed form will then be sent to the Classification Department.

DC4 BX (1-76)

Exhibit (C)

State of Florida
DEPARTMENT OF CORRECTIONS

Monthly Work Gain Time Award

INMATE _____ NUMBER _____ MONTH & YEAR JUNE 1979

JOB ASSIGNMENT NEW CONSTRUCTION
(List Actual Job Performed By Inmate)

JOB CLASSIFICATION [X] Unskilled [ ] Semi-Skilled [ ] Skilled

JOB PERFORMANCE (Mark Appropriate Boxes)

	Unsatisfactory	Satisfactory	Above Satisfactory	Outstanding
QUALITY		X		
QUANTITY		X		
DILIGENCE		X		
	0 Points	1 Point	2 Points	3 Points

TOTAL POINTS: 0-2 = 00% 3-4 = 50% 5-7 = 75% 8-9 = 100%

HOURS WORKED (Show Actual Hours For Each Day) TOTAL HOURS MONTH _____

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
6			6	6	6	6	6			6	6	6	6	6	

17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
	6	6	6	6	6			6	6	6	6	6		

WORK AREA

Total Hours Worked	÷ Hours Of One Day (8)	= Days Worked	× Performance Percentage	= Sub Total	× *Skill Level	= Work Gain Time Award
126	÷ 8	= 15 3/4	× 50%	= 8	× 50%	= 4

* Unskilled = 50% Semi-Skilled = 75% Skilled = 100%

COMMENTS As shown here the average prisoner will be awarded 4 days or less each month as additional gain time; if he has already served 4 years (average) he will receive 6 days statutory gain time, or a total of 13 days under "new gain time law" per month; old law was 15 days statutory plus 6 days additional

_____ _____
(Work Supervisor's Signature) (Date)

INSTRUCTIONS: Work Gain Time Award Forms should be prepared in duplicate. The immediate supervisor is to determine on a daily basis the number of hours of actual work to be credited to the inmate. Enter the number of hours, rounded off to the nearest hour, into the appropriate date block. At the end of the month, calculate the total number of hours worked and enter this figure in the space provided. The completed form will then be sent to the Classification Department.

DC4 800 (1 79)

Exhibit (19)

DEPARTMENT OF OFFENDER REHABILITATION
INTEROFFICE MEMORANDUM

DATE: January 31, 1979

FROM: Ron Jones

TO: All Regional Directors
All Superintendents
All Classification Supervisors
All Regional Classification Specialists

RE: JOB SKILL CLASSIFICATIONS

Attached is a revised list of job skill classifications to be utilized in the placement of inmates at your facility. This is a second draft and is to be implemented immediately. Your reaction to the earlier draft was reviewed, and it is felt your suggestions have been included in one of the categories in this new listing. In most cases, you will find the job category allows flexibility in placement of inmates in the skill level in which they are actually working and that most jobs have a progression of skill level so as to allow the local facility to have some discretion in assignment of inmates. It is anticipated that, as this is implemented, you will note areas that may need further adjustment; and I, therefore, would appreciate hearing from you with any suggestions for changes.

I would encourage that care be exercised in designating job skills. The tendency may be to rate everyone on a particular crew at the highest level; but, in fact, this may not be appropriate. Therefore, please review each job carefully as you make your skill level designation. We want to maintain this as an incentive program, and the designation of job skill levels will have a major impact in this area.

Director, Adult Services Program Office

PBJ/jhb

Attachment

cc: Louie L. Wainwright
Dave Bachman
T. P. Jones
Paul A. Skelton, Jr.

EXHIBIT (E)

ROBERT L. SHEVIN
Attorney General

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL

TALLAHASSEE, FLORIDA 32304

July 18, 1978

INFORMATION COPY

078 96

Mr. Louie L. Wainwright
Secretary, Department of
Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: GAIN-TIME--PRISONERS--DEPARTMENT OF OFFENDER REHABILITATION--applicability of new gain-time formula prescribed by 1978 House Bill 811 to all inmates incarcerated on July 1, 1978. House Bill 811; §944.27, F.S. (1977); §944.275, F.S. (1978 Supp.).

Dear Mr. Wainwright:

This is in response to your request for an opinion on the following questions regarding 1978 House Bill 811, effective July 1, 1978:

(1) DOES HOUSE BILL 811 AFFECT ALL INMATES INCARCERATED IN THE DEPARTMENT OF OFFENDER REHABILITATION ON THAT DATE?

(2) IF THE ANSWER TO QUESTION (1) ABOVE IS NO, DOES HOUSE BILL 811 APPLY TO ALL PERSONS SENTENCED AFTER JULY 1, 1978, OR ONLY TO PERSONS SENTENCED FOR CRIMES COMMITTED AFTER JULY 1, 1978?

Exhibit B

House Bill 811, the effective date of which is July 1, 1978, revised the formula by which gain-time may be granted to prisoners by the Department of Offender Rehabilitation. Sections 944.27, 944.271 and 944.29, F.S. (1977), were repealed and a new §944.275, F.S., was created to replace the repealed sections. I have found nothing in the new §944.275, or in any section of HB 811, or in the title to the bill, indicating that the new gain-time provisions were not intended to apply to all prisoners incarcerated by the Department of Offender Rehabilitation on July 1, 1978. There is no language in the bill limiting or delaying application to those prisoners sentenced after July 1, 1978, nor is there any language limiting application to those prisoners incarcerated for crimes committed after July 1, 1978. In addition, I know of no constitutional prohibition or rule of construction which would be invoked or violated by the application of the new formula to all inmates incarcerated by the Department as of the effective date of the act (July 1, 1978). I find nothing to indicate that the statute will not operate prospectively only. (Also, nothing in HB 811 imposes any additional penalty for a crime already committed, or makes more severe punishment already imposed, and nothing in the bill purports to deprive any inmate of any vested, enforceable right.)

Although the courts have imposed certain procedural requirements as being necessary to guarantee due process when previously granted gain-time is to be forfeited by action of an administrative agency, such as the Department of Offender Rehabilitation, e.g., Rankin v. Wainwright, 351 F. Supp. 1306 (M.D. Fla. 1972), it seems clear that the Legislature's allotment of gain-time and its modification, restriction, or even abolition of gain-time is subject to the broad discretion of the Legislature. The courts have repeatedly emphasized that the allowing of gain-time is an act of grace, and that a prisoner has no right to receive gain-time absent the Legislature's exercise of its grace or discretion. Similarly, the courts have emphasized the Legislature's power to make whatever changes it deems prudent in the gain-time procedure. In Dear v. Mayo, 14 So.2d 267 (Fla. 1943), the court stated: "Parole and gained time is granted by the sovereign as a matter of grace rather than of right," and that "[t]he state may offer such grace under and subject to such conditions as it may consider most conducive to accomplish the desired purpose." (e.s.) In Mayo v. Lukers, 53 So.2d 916, 917 (Fla. 1951), it

was stated that "[t]he cases generally hold that the granting of the gain-time allowance is an act of grace rather than a vested right which may be withdrawn, modified, or denied, dependent on the course of conduct of the prisoner." And, in Kimmons v. Wainwright, 338 So.2d 239 (1 D.C.A. Fla. 1976), the court stated that "[g]ain-time is given to prisoners through the beneficence of the Legislature, and the Legislature has full authority to establish the terms and conditions thereof."

Thus, your first question is answered in the affirmative, and, accordingly, your second question need not be addressed.

SUMMARY

House Bill 6[illegible] which revises the method of granting gain-time, applies to all inmates incarcerated by the Department of Offender Rehabilitation on July 1, 1978, the effective date of the bill.

Sincerely,

ROBERT L. SHEVIN
ATTORNEY GENERAL

Prepared By:

Jerald S. Price
Assistant Attorney General

RLS/JSP/acb

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
JUN 4 - 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM P. BESSER,

Petitioner,

v.

~~LOUIE L. WAINWRIGHT~~ Robert Graham, Governor of Florida

Respondent.

79-5710

Case No. ~~79-510~~

ORIGINAL COPY

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI

~~MOTION TO~~ SUPPLEMENT THE ~~RECORD~~ Petition

Comes now Petitioner, WILLIAM P. BESSER, and moves this Honorable Court to grant an order permitting him to supplement the record as follows:

On the 3rd day of July 1979, Respondent Wainwright filed in the Record a sworn affidavit showing Petitioner's release date at December 9, 1981. (Exhibit A attached)

On or about the 3rd day of March 1980, Respondent Wainwright's agent sent Petitioner a notice that his release date was the 24th day of May, 1982. (Exhibit B attached)

Petitioner has not lost any gain-time but, to the contrary, has been awarded a total of 209 days "additional gain-time" since the Wainwright affidavit was submitted.

Gain-time reduces the actual period of incarceration prior to conditional release. Here however, as the record shows, the award of gain-time increases the period of imprisonment. the two positions are not compatible

Either the Wainwright affidavit (Exhibit A) is false, or Petitioner Besser should be discharged on Mandatory Conditional Release the 11th day of May, 1981, without any further additional gain-time being considered.

If Petitioner's claim is correct that Florida Statute Chapter 944.275 is Expost Facto as applied to him, then his original discharge date of February 7, 1981 would apply, minus the stated 209 days additional gain-time and his mandatory conditional release date, sans any further gain-time awards, would be fixed at July 9, 1980.

The Honorable Court should take Judicial Notice of the patently false affidavit of Respondent Louie L. Wainwright and expedite a ruling based on this supplement which lends immediacy to the above styled cause.

Respectfully submitted:

William P. Besser

William P. Besser

LOUIE L. WAINWRIGHT, SECRETARY

DEPARTMENT OF CORRECTIONS

1311 Winewood Boulevard • Tallahassee, Florida 32301 • Telephone: 904-488-3021

AFFIDAVIT

STATE OF FLORIDA)

COUNTY OF LEON)

Personally appeared before me this day Louie L. Wainwright, who being duly sworn, deposes and says:

That he is the Secretary of the Department of Corrections; that as such Secretary he is the official custodian of all prisoners and the records pertaining thereto;

That William P. Besser, #058568, received a 5-year sentence with credit for 72-days county jail time on January 13, 1977, for the offense of Attempted Burglary and a consecutive 2-year sentence on the same date for Possession of Burglary Tools from the Circuit Court of Pinellas County for a total sentence of 7-years with credit for 72-days county jail time;

That Mr. Besser's sentence has been computed under provision of Section 944.27 Florida Statute, (Repealed) until January 1, 1979, and the remainder of the sentence computed under provision of Section 944.275 Florida Statute, to arrive at a projected release date of December 9, 1981, calculated as follows:

Exhibit A

Sentenced 1/13/77	=	28137	(Days elapsed since 1900)
Sentence in days (7-years)	+	2555	
Jail Time Credit	-	72	
Statutory Gain Time earned prior to 1/1/79 on 789-days served	-	208	
Extra Gain Time earned prior to 1/1/79	-	97	
Statutory Gain Time earned or to be earned on 1074-days served or to be served from 1/1/79	-	387	
Projected release date 12/9/81	=	29928	

L. L. Wainwright

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS

Sworn to and subscribed before me this the 3rd day of July, A.D., 1979.

Gloria C. Henderson
Notary Public

Notary Public, State of Florida at Large
My Commission Expires Aug. 22, 1982
Bonded By American Fire & Casualty Company

RECEIVED MARCH 1980
THROUGH INSTITUTIONAL MAIL ROOM

NAME Berger, William NO 058528 Box # 651

YOUR CURRENT RELEASE DATE (CRD) COMPUTED UNDER THE NEW GAIN TIME LAW IS 5-24-82
THE LAST POSTING OF GAIN TIME OR LOSS OF GAIN TIME ON YOUR SENTENCE WAS 1-1-79

NOTE: (A) BOTH EXHIBITS (A + B) SHOW SAME 1-1-79 DATE
(B) LAW LIBRARY DOES NOT HAVE THE REQUIRED COPY MACHINE
(C) EDUCATIONAL DEPT REFUSES COPIES TO INDIGENTS
(D) ABOVE NOTICE OF RELEASE DATE IS COPIED EXACTLY

William P. Berger

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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM P. BESSER,

Petitioner,

-v- CASE NO. 79-5710

ROBERT GRAHAM, Governor of Florida,

Respondent.

ORIGINAL COPY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Florida denying petitioner's petition for writ of habeas corpus was handed down November 1, 1979 and is reported at 376 So.2d 857.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, §1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTION PRESENTED

WHETHER SECTION 944.275, FLORIDA STATUTES, AS APPLIED TO PETITIONER, IS AN EX POST FACTO LAW.

PRELIMINARY STATEMENT

Respondent believes that the appendix submitted by petitioner is adequate for the purposes of this certiorari proceeding. References thereto will be made by the symbol "A" followed by appropriate page number. Any other references will be specifically designated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This proceeding involves Article I, Section 10, Florida Constitution 1968, and Article I, Section 9,

United States Constitution. The validity of Section 944.275, Florida Statutes, is at issue.

ARGUMENT

WHETHER SECTION 944.275, FLORIDA STATUTES, AS APPLIED TO PETITIONER, IS AN EX POST FACTO LAW.

Petitioner complains that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since Section 944.275, Florida Statutes, effective July 1, 1978, permits the accumulation of a lesser amount of "good time" than did its predecessor, Section 944.27, the application of the new statute to petitioner in the computation of his gain-time makes the statute an ex post facto law because it was not in effect at the time petitioner was convicted and sentenced. Respondent disagrees. This precise issue has also been rejected by the Florida Supreme Court. See Harris v. Wainwright, 376 So.2d 855 (Fla. 1979).

It is appropriate to begin the discussion on this issue by pointing out that petitioner is incarcerated pursuant to a lawful judgment and sentence which he does not attack. See United States v. Addonozio, _____U.S. _____, 60 L.Ed.2d 805, 99 S.Ct._____(1979); Banks v. State, 342 So.2d 469 (Fla. 1976).

The matter of parole prior to 1940 was within the exclusive of the executive branch of government which exclusively exercised that power through a state board of pardons. Singleton v. State, 38 Fla. 297, 21 So.21 (1897); State ex rel. Morenco v. Mayo, 175 So. 806 (1937). Art.XVI, §32,Fla.Const. (1885), was adopted through constitutional

amendment in 1940 and is substantially similar to Art. IV, §8(c), Fla.Const. (1968). See 26 F.S.A. Art. IV, §8(c), Fla.Const. (1968), p. 121. Thus, prior to 1940, there was no constitutional authorization for the legislative creation of a Parole and Probation Commission. In addition, given the constitutional amendment in 1940 and revision in 1968, the provisions for legislative creation of a Parole and Probation Commission were housed within the executive articles of the Constitution, emphasizing the executive nature and origin of parole. Today, the State Board of Pardons, which is an arm of the executive, is the exclusive grantor of "conditional paroles" or "pardons," Beal v. Mayo, 70 So.2d 367 (Fla. 1954) and executive clemency. Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), cert. den., 434 U.S. 878 (1977).

In emphasizing the executive nature of parole, the courts have rejected legislation imposing duties upon or granting powers to the Board of Pardons prior to the adoption in 1940 of Art.XVI, §32,Fla.Const. (1885), for unconstitutionally infringing upon the executive discretion of said Board which, inter alia, then granted paroles. Ex Parte White, 131 Fla. 83, 178 So. 876 (1938).

Moreover, in Marsh v. Garwood, 65 So.2d 15 (Fla. 1953), the Florida Supreme Court stated that the judiciary was without authority to exercise parole powers "for that is strictly a function of the executive branch of the government to be exercised only after the defendant has been convicted and sentenced and hence after the judicial labor has come to an end." Marsh v. Garwood, 65 So.2d at 21. Dye v. United States Parole Commission, 558 F.2d 1376 (10th Cir. 1977); Wright v. State, 342 So.2d 565 (Fla.App. 1 1977); Cf.

Brest v. Ciccone, 371 F.2d 981, 982-983 (8th Cir. 1967). Thus, until 1940, the exercise of parole powers was inextricably and exclusively wed with the exercise of the power of pardon which has been exercised from time immemorial by the executive and could not and still cannot be infringed upon by the Legislature. Singleton v. State, supra. See also, In Re Advisory Opinion to Governor, 64 Fla. 21, 59 So. 786 (1912).

The purpose of tracing the early legal history of the Parole and Probation Commission is to establish that prior to the adoption of Art.XVI, §32,Fla.Const. (1885), in 1940, the power to grant or deny parole was part and parcel of the power of pardon which is an exclusive power of the executive branch of government, in that such powers were exclusively exercised by the State Board of Pardons which continues today to exclusively exercise all powers of executive clemency without legislative restraint. Sullivan v. Askew, supra. Finally, it is respondent's position that Art.IV, §8(c),Fla.Const. (1968), does not vest parole powers in the legislative branch of government, does not change the executive nature of parole, does not place the Commission under the constitutional control of the Legislature, and does not permit the Legislature to restrict, impede, qualify, intercede upon, tamper with, or overrule the Commission in the exercise of its parole powers. Art.IV, §8(c),Fla.Const. (1968) serves only to authorize the legislative creation of a Parole and Probation Commission which is then empowered by the Constitution, not by statute, "to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime." If the Legislature had merely passed legislation creating such a Commission and had failed to statutorily provide or prescribe the powers and duties of the Commission, it would nonetheless possess and be able to exercise those powers set forth in the aforecited

constitutional provision for, although that provision is not self-enacting in regard to creation, once creation is effected, the powers of the Commission flow automatically and without restraint from the Constitution which is their genesis. Thus, although the Commission is created by legislative action, it nonetheless exercises powers exclusive to the executive branch. The Legislature is therefore barred by the doctrine of separation of powers from interferring in any manner with the exercise of those executive powers. Cf. Sullivan v. Askew, supra; Advisory Opinion Of The Governor, In Re Administrative Procedure Act: Executive Clemency, 334 So.2d 561 (Fla. 1976); In Re Advisory Opinion Of The Governor Civil Rights, 306 So.2d 520 (Fla. 1975); Singleton v. State, supra; Art.II, §3, Fla.Const. (1968).

Based upon the foregoing, and under Florida law, there is no right to parole; it is a matter of grace, not of right. Dear v. Mayo, 14 So.2d 267. See Greenholtz v. Inmates of the Nebraska Penal Complex, _____ U.S. ____, 60 L.Ed.2d 668, 675, 99 S.Ct. 2100 (1979); Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir. 1976); Lashley v. State of Florida, 413 F.Supp. 850 (M.D. Fla. 1976). In addition, in United States v. Addonizio, supra, the Court stated:

> To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission and not the courts. . . .

Id. at 814. Cf. Brest v. Ciccone, supra.

Based upon the foregoing, it is respondent's position that petitioner does not possess any "right" to parole

nor to the "accumulation of gain-time" protected by the United States or Florida constitutions. This is so because neither constitution protects that which it does not guarantee. Consequently, petitioner's argument is without merit. Greenholtz, supra, 60 L.Ed.2d at 677; Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976); McIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975).

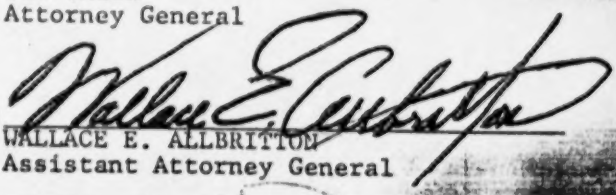
Appellate courts throughout the country have repeatedly recognized that the allowing of gain-time is an act of grace and that a prisoner has no right to receive gain-time in the absence of a legislative provision therefor. In other words, gain-time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957); People ex rel. Kleinger v. Wilson, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Kastel v. Fish, 36 F.Supp. 700 (D.C.Md. 1931); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Comerford v. Massachusetts, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; Lembersky v. Parole Board of Dept. of Correction, 124 N.E.2d 521 (Mass. 1955); People ex rel. Colletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972), citing Dear v. Mayo, 14 So.2d 267 (Fla. 1943), with approval. The decision of the Louisiana Supreme Court in State v. Curtis, 363 So.2d 1375 (La. 1978), is clearly distinguishable from the issue presented sub judice. In Curtis, the court pointed out that the statute there under attack applied "a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer."

The statute here under attack, Section 944.275, Florida Statutes, has no relation to sentencing and does not apply any punitive measure to a crime already consummated to petitioner's detriment or material disadvantage. Particularly is this true when viewed in the context of Florida's law which has long held that the granting of parole and allowance of gain-time is a matter of grace rather than a vested right and may be withdrawn, modified, or denied. Mayo v. Lukers, 53 So.2d 916 (Fla. 1951); Kimmons v. Wainwright, 338 So.2d 239 (Fla. App. 1 1976).

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

By: 
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
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2 Cir Pg 5 March 14 Cert

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BESSER,
PETITIONER

-VS-

ROBERT GRAHAM, GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5710

Petrs Reply Brief

ORIGINAL COPY

TRAVERSE TO RESPONDENT'S BRIEF

OR; IN THE ALTERNATE

MOTION TO STRIKE

- I -

Respondent, for some reason of his own, argues only that the Florida Parole Commission is a Constitutional Agency. Such has absolutely no bearing upon the issues presented here unless Respondent is trying to mislead the Court into believing that Parole and Statutory Gain Time are the same.

- II -

Parole is granted by a Parole Commission through some kind of complicated hocus-pocus dealing with prior record, offense committed, and whims of the members.

All Statutory Gain Time is earned by the prisoner for good conduct.

Parole is not required and any prisoner may, as Petitioner did in November, 1978, decline to even consider accepting a parole since parole is in the nature of a legal contract and need not be accepted.

Statutory Gain Time is aimed solely and completely at Mandatory Conditional Release which is a matter of law and must be accepted. A prisoner may not refuse it.

Parole and Mandatory Conditional Release are neither interdependent nor connected in any manner whatsoever, whatever the basis of parole, be it Legislative or Executive, it is not here at issue and bears absolutely no weight in the present matter.

Statutory Gain Time is a creature of the Legislature and must be given when earned. It may not be withheld except for infractions of the Prison Rules. Even then, it may only be taken in amounts fixed by law and a Disiplinary Report and Hearing is indispensible for its taking.

For these reasons, Court need not inquire as to the Florida Parole System since it is not here at issue so it matters not at all whether the Parole System of Florida is Executive or Legislative and that part of the Response should be striken as irrelevant, immaterial and frivilous.

- III -

The question before this Court:

> Where a Statute is enacted after the commission of an offense which materially alters the situation of the accused to his material disadvantage is the application of such Statute to the accused ex post facto?

It is necessary only to consider the following:

> The offense in the instant case bears date of November 3, 1976. The effective Statute (944.27) at that date:
> (1) The Department of Offender Rehabilitation shall grant the following deductions for gain time...
> (A) 5 days per month off the first and second years of the sentence;
> (B) 10 days per month off the third and fourth years of the sentence; and
> (C) 15 days per month off the fifth and all succeeding years of the sentence.

Petitioner was tried to a jury, convicted, and sentenced to a total of seven years imprisonment the 13th day of January, 1977.

On July 1, 1978, a new Statute (944.275) was enacted:

> (1) The Department of Offender Rehabilitation shall grant the following gain time reductions...
> (A) 3 days per month off the first and second years of the sentence;
> (B) 6 days per month off the third and fourth years of the sentence; and
> (C) 9 days per month off the fifth and all succeeding years of the sentence.

Bluntly stated, the New Gain Time Law (944.275) takes away certain benefits guaranteed by 944.27 at the time of sentencing and therefore adds to the penalty contemplated by the law at time of sentencing; - and is, for that reason, ex post facto as it applies to Petitioner.

- IV -

Respondent states that "Curtis is distinguishable" is either in error or is a deliberate mis-statement. Curtis holds:

> "...does not alter the fact that the statute applies a new punitive measure to a crime already consumated to the detriment or material disadvantage of the wrongdoer." State v. Curtis, 363 So.2d 1375 at 1383.

There, the issue was precisely the same with only the amount of time being

different where the Louisiana Department of Corrections was, as here, attempting to apply a Statute reducing gain time from 25 days per month to 15 days per month to a prisoner sentenced prior to the new law. The matter is even more clearly stated:

> (1) Statutory amendment requiring good time for inmates convicted after September 9, 1977, to be computed on basis of 15 days per month rather than the 25 days as before would violate ex post facto constitutional prohibitions if applied to persons who committed offenses on or prior to the date... State ex rel Bickman v. Dees, 367 So.2d 283 at 284.

This, then, is all the issue presented. We are not at all concerned with Parole, Parole Commissions, or what branch of the State Government controls, although since Respondent attempted to argue that the Parole Commission of Florida is constitutionaly fixed in the Executive it is here required that Petitioner point out that the provision governing such Parole Commission and paroles, Article IV 8 (c), Florida Constitution, states only:

> (c) There <u>may be created by law</u> a parole and probation commission with power to supervise persons on probation and to grant paroles...

and Respondent is appearing to present the untenable position that the Executive Branch of the Florida Government can now create laws.

- V -

The Response is wholly unresponsive in that it does not even touch on the matter here at issue. The Response merely presents a rather rambling account of the history of parole in Florida and then cites cases in which gain time was taken for violations of the rules or conditions applicable in those distinct cases. Not one single case cited applies to the issue here.

Court may take Judicial Notice that the Response fails utterly to deny Petitioner's claim; and, therefore, may be held to agree with the position presented by Petitioner;

And, the Response should be stricken as frivilous.

The Writ should be issued.

Respectfully submitted,

William P. Besser

WILLIAM P. BESSER

CERTIFICATE OF SERVICE

I, William P. Besser, did place a true copy of the foregoing Traverse To Response in the United States Mail this 19th day of February, 1980, directed to Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida.

William P. Besser

WILLIAM P. BESSER

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
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WILLIAM P. BESSER,
PETITIONER

-VS-

ROBERT GRAHAM, GOVERNOR OF FLORIDA,
RESPONDENT

CASE NO. 79-5710

IN THE MATTER OF: PETITION FOR WRIT OF CERTIORARI

MOTION TO EXPEDITE

Comes now William P. Besser, Petitioner above named, and presents this Motion to Expidite, showing cause as follows:

1. Petitioner's cause should prevail.
2. The outcome of the present cause will materially affect thousands of persons; all who were convicted of any offenses occurring prior to either July 1, 1978 (the effective date of Florida Statute 944.275) or January 1, 1979 (the date Florida's Department of Corrections decided to implement the cited Statute).
3. Thousands of Florida prisoners are being denied knowledge as to their release date.
4. Hundreds of Florida prisoners are already serving time past their expiration date under Florida Statute 944.27.
5. Every day of delay causes irreparable damage by keeping prisoners past their proper date of release.
6. The cause presents no complicated issues but, simply stated, asks merely if Florida is permitted to apply an ex post facto law.

Respectfully submitted,

William P. Besser
WILLIAM P. BESSER